

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-4057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067,
77-4068, 77-4073,
77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents,

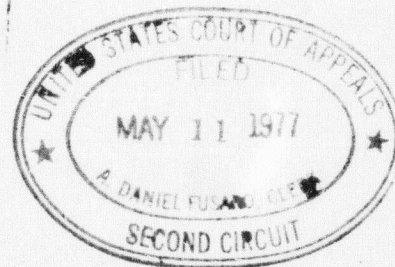
MCI TELECOMMUNICATIONS CORP., ET AL.,

Intervenors.

On Petition for Review of Orders of the
Federal Communications Commission

JOINT APPENDIX TO THE BRIEFS

VOLUME VI



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RESPONSE

American Telephone and Telegraph Company ("AT&T") respectfully submits its Response pursuant to the Notice of Inquiry and Proposed Rule Making ("Notice") (47 F.C.C.2d 644), as modified as to the filing date by the Order of the Chief, Common Carrier Bureau, released March 20, 1975.

1. This proceeding, instituted pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 205, 208 and 403 of the Communications Act of 1934, as amended, is an inquiry and proposed rulemaking into the general area of resale and sharing of communications common carrier services. The Notice (para. 31) listed 12 specific items of inquiry relating to the basic questions of:

" . . . whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use." (Notice, para. 1.)

2. AT&T's position is that the present tariff regulations with respect to resale and sharing* are reasonable and in the public interest, and do not require or warrant substantial changes. As circumstances develop, these regulations can be amended, on a case-by-case basis, to take care of any need which may arise. In such a case, the burden of establishing that the public interest requires such a change should be on the party requesting it. AT&T believes that such cases will arise mainly in the area of value added carriers, who propose technically advanced systems of communication.

3. Of the numerous comments and reply comments that were filed in this proceeding, only the Office of Telecommunications Policy (OTP),** Orlando Communications Club, Inc. (Orlando) and MCI Telecommunications Corporation (MCI)

* Resale is the acquisition of communication services provided by established or specialized common carriers by parties who have no communications need of their own, and the offering by such parties of the services to third parties. Resale may take three forms: resale for profit, resale without profit and augmented resale for profit.

Sharing is the use, by parties who each have a communications need of their own, of communication services provided by established or specialized common carriers. No profit is involved in sharing.

** The status of the OTP Comments in relation to the record in this proceeding is uncertain. If they are intended as original comments, they were filed some two and a half months late. The letter transmitting them states that OTP would be "pleased to have them placed on public record" but no order placing the Comments on record or requesting responses thereto has been received from the Commission pursuant to Paragraph 34 of the Notice.

propose, or appear to propose, drastic changes in the present regulations, e.g., unlimited resale and sharing of communication services. The remaining filings have almost universally expressed an acute awareness of, and concern over, the harmful consequences which would result from any significant expansion of the resale and sharing tariff provisions of the established communications common carriers.

4. A number of the comments express a preference for "expanded" or "liberalized" resale but these submissions are couched in generalities, make no specific proposals, and in any event include no factual or statistical support for their position. With the exception of the filings of OTP and of Orlando, the Comments and Reply Comments submitted herein do not contain any resale or sharing proposals which have not been heretofore addressed by AT&T and others. For the most part, they are ad hoc proposals designed to advance the special interests of the parties making them.

5. Section 1 of this Response will address generally the proposals of OTP, Orlando and MCI. In particular, it will demonstrate that MCI's proposal of "unrestricted resale and sharing"* cannot be taken at face value, and is actually a proposal for very restricted resale and sharing provisions. It will then show that OTP's proposal should not be adopted by the Commission, since it is based on speculation, and since

* MCI Reply, para. 2.

the benefits promised by OTP are currently available under the present tariff provisions. In this Section, it will also be shown that certain other Reply Comments have misinterpreted AT&T's position in this proceeding.*

6. Section 2 of this Response will show why AT&T's existing regulations are in the public interest, and why far-reaching changes in them are undesirable. Section 3 will demonstrate that regulation of resellers is required and necessary under the Communications Act. Section 4 will show that the Commission cannot properly adopt in this proceeding, on the basis of the present record, any rule or order expanding the present resale and sharing provisions. Section 5 will show that in any further proceedings directed to the matters at issue herein, the Commission should have the advice of a Federal-State Joint Board.

* No detailed response need be made to Orlando since it has merely stated, without amplification that "there is no justification for . . . restriction." AT&T's Comments and Reply Comments and the submissions by the vast majority of parties to this proceeding have shown the need for the limitations on resale and sharing.

1. THE COMMISSION SHOULD REJECT THE PROPOSALS
FOR DRASTIC CHANGES IN EXISTING RESALE AND
SHARING PROVISIONS

A. MCI Proposes Limited Resale and Sharing

7. MCI states "that generally unrestricted resale and sharing are in the public interest" (MCI Reply, para. 2), but its definitions of what are "resale" and "sharing" are definitely restricted in scope. For instance, MCI defines a reseller as one who "must intend to provide a service which is 'augmented' or substantially enhanced over that provided by the primary supplier." (Reply, para. 5, emphasis added.) MCI further states that the reseller must be a common carrier, subject to regulation under the Communications Act. (Reply, para. 2.) MCI, in another proceeding, recently objected to another carrier being permitted to subscribe to MCI circuits at a bulk rate, and then as a broker reselling those circuits at a retail rate to its own customers. (See MCI Reply, dated February 10, 1975, to Petitions to Suspend certain MCI tariff provisions proposed by MCI's Transmittal No. 24, dated January 6, 1975, at pp. 7, 8.) MCI's proposal for "generally unrestricted resale" is thus subject to the following restrictions:

- the reseller must "augment" the carrier's service, i.e., not be merely a broker;
- the reseller must be regulated;
- the resale must not be of bulk-priced services.

8. MCI then defines sharing to involve the following limitations:

- "(a) each sharer must have a communications need of his own that arises independently of the sharing arrangement;
- "(b) the sharing arrangements must be operated on a not for profit basis; and
- "(c) costs among the sharers must be allocated on the basis of proportional use of the services or facilities."

9. MCI thus agrees, in effect, with the AT&T position that unlimited resale should not be adopted and that sharers must meet conditions similar to those required by the present AT&T tariffs. The only significant difference in position would appear to be that AT&T suggests that any expansion to cover augmented resale beyond that now permitted by its tariff should be made on a case-by-case basis, while MCI seems to suggest adoption of a general provision that would permit any (1) regulated (2) value-added carrier to resell (3) any nonbulk rated service.

B. OTP's Proposal Is Based on Conjecture

10. OTP proposes unlimited and unregulated resale and sharing of communication services. In so doing, it admits that serious consequences may ensue if its proposal is adopted; it attempts to brush them aside with wholly unsupported assumptions and sheer conjecture. OTP further fails to recognize that the purported "benefits" of its proposal are generally

available under current resale and sharing provisions -- and with none of the adverse consequences inherent in OTP's proposal.

11. OTP concedes that its proposal will directly affect residential telephone subscribers by causing increased interstate MTS rates and, through Separations effects, increased intrastate MTS and local exchange rates (OTP, pp. 34, 36). OTP also recognizes that deaveraging of interstate toll rates will result (OTP, pp. 34, 36), that the impact on intrastate rates could be aggravated if there are shifts from MTS to private line (OTP, p. 36), that TELPAK and WATS will undergo major modifications (OTP, p. 37), and that the result will be increased communications costs to large customers (OTP, p. 37) and a possible shift of users to private microwave (OTP, p. 37). OTP, apparently in the spirit of conducting an experiment simply for the sake of experimentation, attempts to brush away these concededly adverse consequences with such vague and speculative statements as:

- "the actual diversion may be small" (OTP, p. 34)
- "departures from nationwide rate averaging may not be inconsistent with the public interest" (OTP, p. 36)
- "the situation could be aggravated . . . if there are shifts from message toll service (MTS) to private line service" (OTP, p. 36)
- "a general revision of the separations procedures may well be required" (OTP, p. 36, 37)

- "subscribers may be faced with major modifications to the WATS and TELPAK tariffs" (OTP, p. 37)
- "it may be unwarranted to expect any large diversion" (OTP, p. 37) (Emphasis supplied in above quotations.)

A dearth of hard facts evidently did not hinder OTP from reaching its conclusion. Indeed, it admits that:

"The scale and direction of possible impacts of the proposed policy on existing carrier-customer relationships are affected by a number of independent variables whose net effect is not known." (OTP, p. 29.)

12. As will be seen below, the probable consequences of an experiment into unlimited resale and sharing are too serious to be risked on the basis of conjecture that they may not ensue. This is particularly true when it is plain that the benefits cited by OTP are presently available under present regulations. (See paras. 15, 16, 35-37, infra.) Other arguments made by OTP are specifically addressed below in this Response. (Paras. 17, 30, 31, 35, 38-40, 42, 49.)

C. NAMBO, AIA and SIAC Proposals Have Misinterpreted the AT&T Position

13. Misstatements of AT&T's position are contained in the Reply Comments of the National Association of Motor Bus Owners (NAMBO), Aerospace Industries Association of America, Inc. (AIA) and The Securities Industry Automation Corp. (SIAC).

14. NAMBO asserts that treating all modes of transportation as "single customers" would be consistent with paragraphs 8 and 73 of AT&T Comments. This is incorrect. In paragraph 8, AT&T states its willingness to make changes in the resale and sharing provisions which are shown to be desirable and reasonable. Paragraph 73 then offers to expand the tariffs on a case-by-case basis to permit resale of an augmented service. NAMBO does not propose an augmented service and, in our view, its factual submission in this docket is not sufficient to satisfy the public interest requirements for expanding the single customer provisions. Its proposal thus does not fall within the purview of paragraphs 8 and 73.

15. AIA is incorrect in contending that AT&T has the burden of justifying the present single customer provisions, but in any event this was done in AT&T's Comments, dated December 11, 1974. (Para. 24.) SIAC misconstrues AT&T's obligation to provide service in compliance with its tariffs.

2. AT&T'S RESALE AND SHARING PROVISIONS
ARE REASONABLE, AND SUBSTANTIAL
CHANGES THEREIN ARE UNDESIRABLE

A. The Benefits of the Joint Use Provisions

16. AT&T's joint use provisions, recognizing the evolution of computer and business machine technology, encourage the application of multiplexing technology to existing services, thereby promoting the use of data related communications. The joint use provisions also encourage the efficient use of facilities by permitting customers to seek out joint users who have need of the facility during the periods when the customer is not making full use, or any use, of the service. The joint user billing provisions provide that the customer and joint user will share the total communications charges, based upon their proportionate use of the service, thus reducing the communications cost to both parties and equalizing service opportunities.

17. The revenues and costs for both voice grade and less than voice grade private lines are essentially usage insensitive. The charge is the same whether the customer has the line in use 24 hours a day or a few minutes a day, and since the private lines generally use dedicated, full time circuitry, circuit costs are also essentially usage insensitive. Accordingly, joint use of this type of service,

with provision for additional charges to cover any additional terminal and administrative costs when two or more individuals or entities use the same services, does not materially alter revenue/cost relationships. There is thus a minimal effect on users of other services or on rates for private line and other services. As will be seen in the next subpart, this would not be the case if sharing of WATS, TELPAK or discrete wideband services were permitted, as urged by OTP.

B. The Reasons for Limiting Joint Use to
Voice Grade and Under Services

18. The following discussion (paras. 18-23) will explain why the extension of sharing to TELPAK, WATS or discrete wideband private line services would result in higher telecommunications rates to existing users of these services and in higher rates for users of Message Telecommunications Service (MTS) and other services. Higher rates could cause service to be unavailable to some customers who currently can avail themselves thereof and would cause customers to shift to communications alternatives, to the detriment of the overall body of users of services of AT&T and the other Bell System companies.

1. TELPAK

19. The rates for TELPAK base capacity are based upon the average use or fill by a single customer and are

relatively usage insensitive. Costs, on the other hand, are usage sensitive and increase as usage or fill of base capacity increases. Where, as here, flat rates are based on an average fill by single customers, it is inappropriate to permit individuals to aggregate their communications needs and share the base capacity, since such sharing would produce higher average fills thus causing costs to increase without corresponding increases in revenue.

20. To compensate for the higher fills and costs associated with changes in the sharing provisions, TELPAK rates would have to be raised, with the probable result that TELPAK would be competitively ineffective with respect to private microwave (PMW). TELPAK customers would find that the higher TELPAK rates would make it economically attractive to construct their own, or share in existing, PMW systems; or to shift to other sources and means of communications. The loss of TELPAK business would result in diminished contribution to overall common costs of the company, or indeed to a complete loss of such contributions. Increased rates for other communications services, including MTS, would then be necessary.

21. Shared TELPAK would also encourage users of other AT&T services to group together in order to shift to TELPAK. Such shifts would alter the revenue/cost relationships of these services and would result in a loss of contributions, causing further pressure to increase rates for MTS.

22. TELPAK rates are volume bulk rates currently available to individual customers with large communications needs, but the contribution from these bulk rates result in lower-- not higher-- rates to users of other AT&T services. The elimination of TELPAK, or the increased rates therefore, which would result from sharing of TELPAK, will result in increased rates to large and small users alike. The increased rates will deny service to customers who were marginal users under pre-TELPAK sharing rates.

2. WATS

23. WATS is priced so that a subscriber pays a fixed flat monthly charge for 10 hours of use for Measured Time Service, or for 240 hours of use for Full Business Day Service. Use beyond these limits is billed on a cumulative basis for the additional hours used. The present revenue/cost relationship for WATS is highly favorable and aids in keeping MTS rates lower than they otherwise would be. However, this relationship is a function of the usage characteristics at present rates. Shared use would lead to a significant diversion of MTS usage to WATS, altering the usage characteristics of WATS during peak and off-peak load periods and changing the now favorable revenue/cost relationship. This would result in the need for increased WATS rates.

3. Discrete Wideband Private Line Services

24. Shared use of the discrete wideband channels would result in losses of revenues and contribution because of shifts to the discrete wideband offerings from other services, with consequences similar to those discussed in subparts (1) and (2) above. Sharing would further impede or destroy the usefulness of these offerings for the users whose specialized and unique needs they were designed to meet, result in inefficient use of facilities, cause increased construction and inhibit the introduction of technological changes designed to meet the specialized needs of their unique users. (See AT&T's Reply Comments, dated December 11, 1974, paras. 7-9.)

C. The Reasons Why AT&T's Resale Provisions
Should Not Be Expanded (Other Than for
Augmented Services)

25. As previously stated, resale is the acquisition of communications services, provided by established or specialized communications common carriers, by parties who have no communications need of their own, and the offering by such parties of the services — in augmented form or their original form — to third parties. The service could be offered "as is," either at the common carrier's rate or at a different rate, or in an "augmented" form. In order to be augmented, the reseller would have to alter substantially the service

obtained from the carrier so that the reseller's offering to the public would be substantially dissimilar to the service offered by established carriers. The offering of a service exactly as provided by the carrier, but at a different rate, does not constitute the offering of an augmented service. Resale may thus take three forms: (1) resale without profit and without augmentation; (2) resale for profit and without augmentation; and (3) augmented resale.

26. As shown in detail in AT&T's Comments, dated December 11, 1974 (para. 24), the so-called single customer provisions of AT&T tariffs currently permit limited resale without profit and without augmentation. These provisions reflect situations where special provisions are proper in order (a) to meet the realities of business, (b) to further the policies of the United States Government, (c) to promote the health and safety of the public and (d) to permit innovative service concepts. The participants in this docket generally do not challenge the reasonableness of these provisions.

27. Expansion of the so-called single customer provisions to include other groups of users, as proposed by numerous parties herein (generally for the sole benefit of the party making the proposal), would violate the TELPAK Sharing decision* and would constitute a rate prescription

* In the Matter of TELPAK Sharing, 23 F.C.C.2d 606 (1970), reversed in part, American Telephone and Telegraph Co. v. F.C.C., 449 F.2d 439 (2d Cir. 1971).

in violation of Section 205 of the Communications Act. Section 4, below, paragraphs 43-53, will discuss these factors in detail.

28. The adverse effects upon revenue/cost relationships, service rates, availability of service and the other factors discussed under subtopic B, paragraphs 18-23, above, would likewise occur as a result of expanding resale. In addition, resale interposes a middleman who isolates the consumer with need for communications services from the telephone company which provides the services and facilities. AT&T's Comments herein, dated December 11, 1974 (paras. 65-69) discuss the following impacts caused by the interposition of a middleman:

- The telephone company is actively and directly involved with satisfying the consumer's needs whenever he picks up the telephone. The service of all telephone customers can be affected by poor service caused by the interposition of a middleman.
- The direct interaction between customer and telephone company tends to promote good service. Delays and inefficiencies arising from the barrier between them - the middleman - will detract from service.

- Overly optimistic predictions by middlemen of their prospective sales may lead to construction of more plant than actually needed, and therefore to higher costs and rates for all consumers. Similarly, underestimates of demand may lead to facilities shortages.

29. The interposition of a middleman will undoubtedly interfere with the continuous dialogue directly between users of Bell services and the telephone company Account Managers. These Account Managers are technically competent individuals trained to evaluate the overall communications needs of customers,* and to recommend new and better communications approaches to fit the customers specific business or operational problems. Moreover, the ongoing opportunity for the carrier to remain aware of customer needs permits the carrier to promptly offer new or improved services to its customers as innovation occurs and to accurately forecast future facilities requirements. A reseller or broker of communications would isolate communication users from telephone company representatives and undoubtedly interfere with this developmental process to the ultimate detriment of all users.

30. OTP suggests, as a reason for permitting unlimited resale, that the reseller can give communication advice to its customers. However, there now are a large

* F.C.C. Docket No. 18128, Bell Exhibit 1, pp. 5, 6.

number of communications consulting firms which are used by smaller businesses or by those larger businesses which do not have their own communications staff. There is simply no need to establish resellers of facilities, whose primary interest would be resale rather than advice, in order to give customers the benefit of independent evaluation, as OTP contends. OTP offers no facts to indicate otherwise.

31. OTP likewise offers no facts to support its conclusion that the risk taking involved in innovation would be encouraged by permitting unlimited resale. To the contrary, the necessity to post a deposit or bond of sufficient magnitude to protect the carriers (and its ratepayers) from such risks, as proposed by OTP, would discourage resellers from embarking on potentially risky ventures.

32. AT&T included in its initial Comments an estimate, on a conservative basis, of the effects of unlimited resale and sharing upon Bell interstate revenues and costs.*

* MCI's Reply Comments allege that this estimate may not have taken stimulation sufficiently into account, may have stated costs inappropriately, and in any event did not focus upon MCI's "definitional restrictions." The estimate did include approximately \$30 million worth of new Bell revenue due to stimulation, calculated as described in Attachment 1 to AT&T's Comments. Nothing has been presented to indicate that this is insufficient. Neither MCI nor any other party has presented data based on a study of the effect of MCI's proposed "definitional restrictions." AT&T alone has undertaken to quantify the initial effects of unlimited resale and sharing in response to the Notice of Inquiry.

The estimated net revenue loss of over \$178 million was only for the first year of unlimited resale and sharing, and this loss did not consider shifts from MTS and WATS to Series 2000, 3000 or 8000 private line services; shifts from below voice grade services to shared voice grade services; shifts into or out of Full Business Day, or Measured Time Inward WATS; or shifts of any services into Measured Time Outward WATS. These shifts would most certainly occur and would intensify the net revenue loss in the first year and in subsequent years. The long run overall revenue effect would be many times that projected in the estimate.

33. One of the cardinal tenets of AT&T's pricing philosophy, and therefore its overall service rate structure, has been to promote the goal of making telecommunications service available to all people regardless of economic status (universal service). AT&T and the Bell System operating companies have sought to achieve this goal by flowing support from other services to cover joint and overhead costs which otherwise would be borne by the basic exchange service if it stood alone. Extending sharing to all interstate services would dilute the effectiveness of this pricing philosophy. This pricing philosophy, which has been recognized by this

Commission,* falls within the mandate of Section 1 of the Communications Act.**

34. Unlimited resale and sharing can affect basic exchange rates through Separations' changes resulting from shifts in relative usage of various services, and because of losses in contribution to joint and common costs, resulting from the repricing necessitated by the expanded resale and sharing. While the effect on basic exchange rates from unlimited resale and sharing have not been quantified, the Bell System's Response filed in Docket No. 20003 on April 21, 1975, demonstrates that the loss of all contributions would cause basic exchange rates to be raised by approximately 70 percent (para. II-34, pp. 21, 22; Bell Ex. 1). AT&T is not claiming that unlimited resale and sharing, alone, will cause an increase in exchange rates to that extent. Expanded resale and sharing would, however, result in pricing more related to costs. This, in turn, will reduce the contributions some

* "Thus, AT&T alleges that new entry might require it to depart from cost averaging and uniform nationwide interstate rates. This approach, to the pricing of AT&T services in the past has been generally regarded as consistent with the public interest in the context of the predominantly monopoly structure which heretofore has characterized the common carrier industry." (See Specialized Common Carriers, 29 F.C.C.2d 870, 915 (1971); see also, Notice, para. 4.)

** Section 1 of the Communications Act states that its purpose is "to make available so far as possible, to all the people of the United States a rapid, efficient nationwide and worldwide wire and radio communications service."

services currently make to common costs and cause increased rates for MTS and, through Separations, increased basic exchange rates.

35. Resale and sharing of TELPAK, WATS and discrete wideband channels would probably lead to further departures from nationwide average pricing* and the resulting deaveraged pricing will have a two-fold effect. A customer in a large city is more likely to find others to share with him, and middlemen seeking out opportunities for resale and shared use will concentrate on high traffic routes between large cities. It is therefore large city customers who are likely to be able to take advantage of any savings from resale or sharing. As demonstrated above, expanded resale and sharing will at the same time cause generally increased rate levels for those who cannot take advantage of expanded resale and sharing. Thus, residential users and small town business customers will pay higher service rates and be unable to take advantage of savings from resale and sharing.**

* The use of nationwide average pricing in private line services left the high traffic density, low unit cost intercity routes vulnerable to the competitive services offered by other common carriers. The Bell System has found it necessary to depart from nationwide average pricing by establishing Hi-Lo rates for Series 2000 and 3000 services. The proliferation of resale and sharing will increase pressure for further deaveraging of rates.

** Average pricing policies were apparently endorsed by the OTP in a recent publication. Mr. John Eger, Acting Director of OTP wrote to Senator Baker, under date of February 13, 1975, enclosing an OTP publication, dated February 1, 1975, entitled "Television Distributors in Rural Areas." Mr. Eger stated in his letter that

(Cont'd)

36. Substantially expanded resale provisions would also inhibit introduction of technological advances and new services by communications common carriers. Many such proposed improvements would have adverse effects on the business of resellers, resulting in pressures by them against the change and, at a minimum, a delay in implementing

* (Cont'd)

"Both the Congress and the Administration have sought to develop a balanced national growth policy, in which services and opportunities might be more equitably shared between metropolitan and rural areas. Communications services, to the extent they nullify distance and bridge the gaps among disparate elements of our society, can contribute to this enterprise."

The enclosed OTP publication stated:

"1. Introduction

". . . It is necessary, as reflected in the Rural Development Act of 1972, 'to make rural America a better place in which to live and work' (House Report No. 92-385, U.S. Code, Congressional and Administrative News, Vol. 1, 92d Cong., 2d Sess., p. 3150). This requires in the first instance a certain parity of opportunities and services as between metropolitan and rural areas.

"2. The Potential Contribution of Advanced Telecommunications

"If the desired degree of parity between rural and urban life is to be attained, instrumentalities must be developed for a more equitable distribution of opportunities and services. In many instances, telecommunications can serve this purpose by facilitating the provision of health, education, social, and entertainment services to sparsely settled areas without adverse effects on the beneficial aspects of rural life." (p. 1, para. 1, 2.)

OTP's Comments in this proceeding - conceding increased residential phone bills and deaveraged rates - appear to be inconsistent with the goals of OTP as stated in the publication.

it. Changes in service rates, or realignment of rates between services, could also afford a similar threat to the business of resellers.

D. The Reasons Why the Resale Provisions May Be Expanded, as Appropriate, to Permit Resale of Services in an Augmented Form

37. AT&T has previously stated that it stands ready to revise its tariffs to provide for augmented use of its services if it is shown to be in the public interest to do so.* Others have likewise recognized that resale of augmented services is desirable.** While it seems a relatively easy matter to define broad guidelines as to what is not an augmented service -- for example, the offering of a service which can be obtained from an existing carrier at a different rate -- the decision as to whether a proposed service is an augmented service would depend upon the circumstances of the particular service proposed. For this reason, and because a careful balancing of the interests of all subscribers is involved, any proposed resale of an augmented service should be considered on a case-by-case basis with the party requesting modification of the resale provision having the burden of justifying such modifications.

* AT&T Comments, para. 71-73.

** See the Reply Comments of MCI (paras. 5, 25, 26, 27, 36-40); Comments of Western Union (para. 25); Comments of SPCC (para. 4); Comments of Datran (para. 25).

38. Resale of an augmented service should stimulate new technology, or new applications of existing technology, since enhancement of the carriers' service to create a substantially new service will presumably be necessary to permit the reseller to market its augmented service. Other forms of resale discourage the application of technology to communications since the additional cost to the reseller for such application will reduce the margin for profit, to the resellers competitive disadvantage. Thus, the objectives mentioned by OTP under its topic "Timely Exploitation of Advancing Technology" (Comment, pp. 27, 28) can be achieved with little or no adverse consequences to the public or to existing carriers, if resale is permitted by composite data service vendors (CDSVs) and by entities offering augmented services. The Commission should, of course, permit existing carriers to offer services in competition with those offered by CDSVs and augmented resellers.

* * * * *

39. In summary, the existing resale and sharing provisions encourage the efficient use of facilities, encourage technological advancements, and result in lower rates for services than would be possible under unlimited resale or sharing. No party to this proceeding has come forward with any facts establishing that expansion of the resale or sharing provision, other than as proposed by AT&T, will result in further

benefits. To expand the resale and sharing provisions as urged by OTP would result in those consequences enumerated above and would be contrary to the public interest. Lastly, the movement toward "cost related prices" required as a result of unlimited resale and sharing is of questionable "benefit" when it will result in higher prices and less service availability to most subscribers.

3. REGULATION OF RESELLERS IS REQUIRED

40. OTP urges that resellers and sharers should not be subject to Commission regulation. OTP bases this proposal on the erroneous premises that resellers and sharers are not common carriers* subject to regulation under the Communications Act and that regulation is "justified solely by the presence or likely emergence of monopoly power" (OTP, p. 13). OTP bases its allegation that resellers and sharers are not common carriers on freight, air and motor forwarding cases, none of which arose under the Communications Act or are controlling on the issues presented here as to interstate communications.** As for the alleged need for monopoly power, it is beyond question that regulation is constitutionally permissible whenever necessary to protect the public, regardless of the presence or likely emergence of monopoly power. It is

* The statement on the legislative history of the Act (cited by OTP, p. 4) that "common carrier" relate only to carriers in the ordinary sense of the word was made to assure Congress that the collection and distribution of news would not be subject to common carriers regulation (Conference Report on Communications Act of 1934, H.R. Rep. No. 1918, 73d Cong., 2d Sess. (1934); Statement of Senator Dill in the Congressional Record of March 10, 1934; Report of the House of Representatives on Regulation of Interstate and Foreign Commerce by Wire and Radio, Rep. No. 1850, 72d Cong., 2d Sess.). Senator Dill in hearings before the Committee on Interstate and Foreign Commerce on H.R. 8301, conducted on May 8, 1934, recognized that Section 2 of the bill "applies to 'persons,' whereas the I.C. (Interstate Commerce) Act applies to 'common carriers.'"

** The question of whether freight forwarders were or were not common carriers was not at issue in the freight forwarding cases cited by OTP. The cases cited under the Motor Carrier Act deal with the construction of statutory language in the Act which specifically made a certain type of freight forwarders common carriers. The Civil Aeronautics Act contain specific language permitting the CAB not to regulate indirect freight forwarders to the extent that direct freight forwarders are regulated.

for this reason that grain elevators,* banks,** insurance companies and agents,*** milk producers**** and countless others are regulated. And it is precisely for the protection of the public that resellers for profit - which classification would include augmented resellers - must be regulated. Thus, the "studies" which purport to show that the capital requirement for entrance in the Value Added Networks (VANs) is such that more than one firm can survive, submitted by OTP's letter dated March 26, 1975, are not controlling in this proceeding.*****

41. The position stated above is supported by this Commission's decision in the Computer Inquiry, Docket No. 16979, Tentative Decision, 28 F.C.C.2d 291 (1970); Final Decision and Order, 28 F.C.C.2d 267 (1971). There it was recognized that regulation was necessary "where such other factors are present to require governmental intervention to protect the public interest . . ." (Tentative Decision at page 297). The Commission concluded in its Final Decision that "the Communications Act of 1934 confers comprehensive power upon the Commission to

* Munn v. Illinois, 94 U.S. 113 (1877).

** Noble State Bank v. Haskell, 219 U.S. 104 (1911).

*** German Alliance Insurance Co. v. Lewis, Superintendent of Insurance of the State of Kansas, 233 U.S. 289 (1913); O'Gorman & Young, Inc. v. Hartford Fire Insurance Co., 282 U.S. 251 (1931).

**** Nebbia v. New York, 291 U.S. 502 (1934).

***** It should be noted that OTP did not submit studies or other empirical data in support of the purported benefits of their proposal, or to indicate the magnitude of the admitted consequences thereof.

regulate the rendition for hire of interstate and foreign communications services by wire and radio and all persons engaged in such service," and that those industries which are "essentially communications" warrant appropriate regulatory treatment as common carrier services under the Act.

42. AT&T supports regulation of resellers to the same degree as regulation of established carriers. The submissions of AT&T and of numerous other parties in this proceeding clearly indicate the adverse service and financial consequences to the public and carriers alike which would occur if unregulated resale for profit is permitted. The overall consensus of the parties, with the notable exception of OTP's submission, is that regulation of resellers is both appropriate and required under the Communications Act.

4. THE COMMISSION CANNOT, ON THE BASIS
OF THE PRESENT RECORD, ADOPT ANY RULE
OR ORDER EXPANDING THE SHARING OR
RESALE PROVISIONS

43. Various parties have suggested that nonprofit industry groups or entities subject to regulation should be permitted to share and resell communications services, or should be treated as single customers. The purported justification for such proposals is that users in a common line of business would benefit from reduced communications costs, and that this would be passed on to the public through reduced prices.

44. The Commission in the TELPAC Sharing decision* rejected such arguments as being insufficient to permit expansion of the sharing or single customer provisions. The Commission said:

"... We cannot equate the public interest argument advanced by the sharers with their private business interest. We must consider the public interest as a whole and cannot segmentize it to promote the business interests of a select few. As heretofore noted, one of the principal public interest factors or considerations cited by present sharers is that the economic benefits derived from sharing are communicated directly to the public in rate savings. However, a reduction in communications costs, whether by sharers or nonsharers, would be expected to inure to the benefit of the public. Moreover, for the purposes of this proceeding, we cannot see the relevance, insofar as the public interest is concerned, of whether the economic benefits are directly or indirectly passed on to the public."

* In the Matter of Telpak Sharing, 23 F.C.C.2d 606, 615 (1970), reversed in part, American Telephone and Telegraph Co. v. F.C.C., 449 F.2d 439 (2d Cir. 1971).

45. The record herein is wholly devoid of any facts or data from which this Commission can prescribe sharing of TELPAK, WATS or above voice grade services. To do so therefore would violate the Court's ruling in the TELPAK Sharing case as well as Section 205(a) of the Communications Act.

46. The filings herein indicate cognizance of the severe consequences of resale and a realization that resale would be contrary to the overall public interest. While a few parties stated they would favor "liberalization" or "greater flexibility" in the resale provisions, no attempt has been made to justify their position. The vast majority of parties are so concerned with the consequences of resale that they stressed that sharing should not be permitted to be a facade for resale but must be "bona fide,"* or that additional restrictions, including regulation, be imposed to prevent sharing from being a hidden resale. Clearly, no party has submitted any facts to justify expanding resale beyond that proposed by AT&T. Likewise, the record contains no

* AT&T tariff requirements adequately prevent sharing from becoming a hidden resale. Thus the tariffs provide that a customer or joint user have a communications requirement of his own (AT&T Tariff F.C.C. No. 260, para. 2.5); service may be used by a customer or joint user only for communications relating directly to their business (AT&T Tariff F.C.C. No. 260, para. 2.2.1(A)); use for the transmission, collection or delivery of communications for others is prohibited; use for any purpose for which a payment or other compensation shall be received is prohibited (AT&T Tariff F.C.C. No. 260, para. 2.3); and billing is to be made directly to joint users (AT&T Tariff F.C.C. No. 260, para. 2.5).

evidence to permit a finding by this Commission that existing resale restrictions are unreasonable or unlawful.* Not only is there no rational basis in the present record for a finding that expanded resale (or sharing) would be reasonable,** the record affirmatively reflects a general recognition that permitting expanded resale -- other than for augmented services -- or expanded sharing would result in the adverse consequences discussed herein.

47. The courts have uniformly held that it is the actual impact of agency action, and not its form, that is decisive in determining the nature of the finding and evidence that are required to support the action. See, for example, Baltimore and Ohio R.R. v. U.S., 277 U.S. 291, 300 (1928); American Telephone and Telegraph Co. v. F.C.C., 449 F.2d 439, 451 (1971); Houston Belt and Terminal Ry. v. U.S., 153 F. Supp. 3, 7-8 (S.D. Tex. 1957), aff'd, 356 U.S. 23 (1958); Moss v. CAB, 430 F.2d 891 (1970). The impact of issuing a rule or order which would expand the resale, sharing or single customer

* Under Section 205 of the Communications Act, a tariff provision may be set aside only if, after full opportunity for a hearing, it is found that such provision ". . . is or will be in violation of the provisions of this act. . . ." The burden of proof clearly rests with those who attack the tariff provisions as unlawful. No parties have satisfied this burden.

** The Commission's authority to prescribe practices is derived from Section 205(a) of the Communications Act. This authority is not unlimited but must have a rational basis in the record. See: Florida v. U.S., 282 U.S. 194, 214 (1931); U.S. v. Baltimore and Ohio R.R., 293 U.S. 454 (1935); Joseph v. F.C.C., 404 F.2d 207, 211-12 (D.C. Cir. 1968); Wart Radio v. F.C.C., 418 F.2d 1153 (D.C. Cir. 1969).

provisions would be, in effect, to fix and prescribe rates which are substantially different from those currently charged, and which would be equivalent to a rate reduction for the customers who could take advantage of the changed provisions. There is simply no evidence in this proceeding to support the justness or reasonableness of such a rate change. The Commission clearly has no authority under the Communications Act to issue such an order or prescribe such a rule.

5. FURTHER PROCEEDINGS

48. Paragraphs 34 and 39 of the Notice state that parties may request further proceedings as a part of their reply findings. AT&T does not believe that the submission of further comments directed to the overall issue of resale and sharing of communications service or to the carriers' existing tariffs* is necessary. The public has been on notice, since July 5, 1974, of this proceeding and all interested persons have been given ample opportunity to file comments with this Commission. As stated, no evidence has been submitted which would support a substantial expansion of sharing or resale provisions.

49. The effects of unlimited or significantly expanded resale and sharing cannot be limited to interstate communications services subject to this Commission's jurisdiction, since changes in interstate usage due to changes in revenue/cost relationships will, by reason of existing Separations procedures, also cause changes in revenue requirements for intrastate services (OTP, pp. 34, 36, 37; AT&T Comments, paras. 20, 41, 43, 59; AT&T Reply, para. 1). If, despite the state of the record herein, the Commission should conclude

* Everything from the status quo to unlimited and unregulated resale and sharing has heretofore been proposed and all parties have now had an opportunity to comment thereon.

that it should pursue the matter of any possible substantial change in resale and sharing provisions, a Federal-State Joint Board should be convened to consider Separations effects of any such change.

50. Finally, AT&T respectfully submits that if the Commission is unable to conclude that this proceeding should be terminated without any further action, it should issue a proposed decision subject to comment by interested parties prior to issuing any final Opinion and Order, or rules.

CONCLUSION

51. The purpose of this proceeding is to determine, based upon matters submitted for the record (Notice, para. 40), answers to the following questions:

" . . . Whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use." (Notice, para. 1)

As hereinabove demonstrated, the record in this proceeding is devoid of any evidence upon which this Commission could base any order or rule requiring a substantial expansion of resale or sharing. The record, in fact, demonstrates that no major modification of present resale or sharing provisions should be undertaken by this Commission.

52. What the record reflects -- i.e., that resale and sharing should not be substantially expanded other than to permit resale of an augmented service -- is also the result which will best serve the "public good." By and large the parties filing comments in this docket represent that subsector of the public which have relatively large business communications needs, most of which are met by private line services. While these parties have a natural tendency to equate the "public good" to their own interests, it must be recognized that what they have proposed in the way of expanding the sharing or single customer provisions is simply a

promotion of their own pocketbook interest in obtaining for themselves or, where associations are involved, their members, lower cost communications even though the result is that others will have to pay more. It is significant that these parties can serve their own interests with expanded sharing and therefore advocate little or no expansion of resale.

53. The residential user and the small businessman, another sector of the "public," relies upon MTS, both interstate and intrastate, and basic exchange service to meet their everyday economic and social needs. They need readily available communications, for instance, to meet emergency health and safety needs. The present sharing and resale provisions now help to keep basic exchange and MTS rates low. No changes in those provisions should be ordered in this proceeding.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

April 25, 1975

JOINT RESPONSE OF
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
THE ASSOCIATED PRESS, AND
COMMODITY NEWS SERVICES, INC.

The American Newspaper Publishers Association (ANPA), The Associated Press (AP), and Commodity News Services, Inc. (CNS), by their attorneys, pursuant to the Commission's Notice of Inquiry and Proposed Rulemaking herein, 47 F.C.C.2d 644 (1974), hereby submit their joint response to the reply comments filed in this proceeding.

Introduction

The initial comments of ANPA, AP, and CNS indicated that tariff provisions permitting joint use of private line service were of substantial benefit to the press, the news wire services, and the public generally. However, a number of present tariff provisions were identified which inhibit the most economical and efficient use of common carrier services and facilities. Specifically, the usual tariff requirement that private line services may be used only

for the transmission of communications "to or from the customer" could be interpreted to prevent an entity whose function is to disseminate news information from obtaining lines linking a news source with a news recipient, where neither termination point of the line is on the news organization's premises. Second, AT&T's charge of \$10.50* per month for each service terminal or station terminal used to meet the requirements of a joint user stands as a major barrier to joint use arrangements involving large multi-point circuits such as those used by the news wire services. Finally, the general prohibition against joint use of discrete greater-than-voice-grade facilities puts an artificial limit on the ability of the press to consolidate communications requirements into the most efficient possible network.

Regulation of Joint Use

No party has disputed the fact that joint use arrangements by wire services now in effect, or contemplated, are very much in the public interest. Indeed, OTP, in its comprehensive comments, has shown that great public benefits flow from such use of common carrier services.

* This charge was recently increased from \$10 along with all other elements of private line service by AT&T's tariff revisions filed with AT&T Transmittal No. 12303 (March 7, 1975).

In view of the admitted desirability, as a minimum, of the present freedom of customers to enter joint use arrangements, it seems rather peculiar, if not perverse, that the American Trucking Associations should suggest that the Commission establish a class of so-called "Limited Common Carriers" to encompass those who now share lines. (Truckers Reply, pp. 10-12, 19.) This proposal would require news wire services, or others, entering joint use arrangements to be certificated and regulated in order to continue operations which have served the public interest well for years without regulation. Such an outreach of the regulatory grasp would surely strangle many existing or planned arrangements, with an all-too-likely consequence, that some small news wire services would be discontinued altogether, and the chances that others would be established would become greatly decreased.

In addition to these intolerable practical consequences, as a legal proposition the "Limited Common Carrier" proposal is completely untenable. OTP, in a thorough analysis, has demonstrated that common carrier regulation of shared use and resale is not required as a matter of law. (OTP Comments, pp. 3-16.) Moreover, present and possible future line sharing by the press has none of the attributes of common carriage such as an exclusive franchise, an obligation to serve all members of the public, and a

disinterest in the content of the messages transmitted. Multiple Licensing--Safety and Special Radio Services, 24 F.C.C.2d 510, 519 n.2 (1970). In particular, non-profit, cooperative service arrangements have long been regarded by the Commission as distinct from common carriage. Co-operative Sharing of Operational Fixed Stations, 4 F.C.C.2d 406, 417 (1966). Finally, as already shown by AP and CNS in their initial comments, the legislative history of the Communications Act spells out explicitly that press associations shall not be considered common carriers. (AP Comments, p. 23; CNS Comments, p. 15.)

For all of the above reasons, the Commission should not even consider the Truckers' proposal that joint use arrangements, at least those of the press, be treated as common carriage.

"To or from the Customer"

The blanket prohibition in AT&T's tariff against the transmission of communications between stations of authorized users (the requirement that communications be "to or from the customer") has not been justified. AT&T's only defense of the restriction is the assertion that "[t]his would encourage unregulated resale." (AT&T Reply, p. 10.) Whatever the merit of AT&T's position as a general matter, it is unreasonable if applied to prevent a press entity from leasing lines for the transmission

of news information to or from its members or subscribers. News wire services, especially, have a legitimate functional interest in the dissemination of news information, and in some instances this may best be carried out by the provision of the means to transmit news directly among members or subscribers. As we have shown above, the dissemination of news by the press is not subject to common carrier regulation, so AT&T's fear that a relaxation of its "to or from the customer" requirement would permit improper use of its service is baseless in relation to use by the press.

Therefore, even if AT&T justifiably may continue the "to or from the customer" limitation for most uses, it should, nonetheless, revise its tariff to permit the interchange of news information among the members or subscribers of a press organization.

Joint Use Charges

AT&T imposes two additional charges on joint use arrangements. The first is \$7.90 per month for each service arranged for joint use. The second is \$10.50 per month for each service or station terminal of a joint user. AP, ANPA, and CNS all objected to the per station terminal charge in their initial comments. The fact that this charge constitutes a serious barrier to the efficient

use of channels was dramatically illustrated in the case of CNS, which would have to pay joint user charges in excess of \$30,000 per month in order to consolidate its present service on another customer's excess channel capacity.

AT&T has made no attempt to justify these joint user charges, and therefore we join in the Truckers' recommendation that "AT&T should be required, under Commission scrutiny, to justify its joint use rate structure."

(Truckers' Reply, p. 9.)

Sharing of Greater-than-Voice-Grade
Discrete Facilities

Virtually all participants in this proceeding have indicated support for tariff revisions to permit, as a minimum, the sharing of greater-than-voice-grade discrete facilities. AT&T, in reply, adumbrates that shared use of discrete wideband offerings could result in adjustments in rates or rate structures for those services. (AT&T Reply, pp. 7-8.) However, AT&T offers no factual support for this assertion. Moreover, as OTP has shown, brokerage of discrete broadband channels can insure that the price relationships between services are appropriate. (OTP Comments, p. 23.) Sharing of discrete broadband facilities would also be desirable to give users an opportunity to choose among competing suppliers for the multiplexing equipment used to derive voice grade channels from wider band facilities.

AT&T also makes the spurious argument that shared use of some wideband offerings, such as Series 7000, might be inefficient. (AT&T Reply, pp. 8-9.) We submit that users should have the option of deciding for themselves what is an efficient use of facilities. If AT&T is correct, no shared use will take place, and users will not be harmed; if AT&T is wrong, users will benefit from the availability of options to meet their service requirements. AT&T's fear that shared use will require additional construction to adapt broadband facilities is unsubstantiated. No party requests technical modifications of these facilities; what is needed is a removal of artificial constraints in the tariff offerings. Naturally, if shared use will stimulate demand for new types of broadband offerings, AT&T and other carriers should meet those market needs.

In sum, the Commission should not permit the continuation of restrictions on the joint use of discrete broadband facilities in the absence of convincing evidence that those restrictions result in a net benefit to the public.

Conclusion

ANPA, AP, and CNS reiterate their position that the shared use provisions of AT&T's Dataphone Digital Service tariff would, if applied to private line service, meet the present and anticipated needs of the press. In the

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alternative, a more limited, ad hoc approach, adopting the recommendations in this response, would also be acceptable. Thus, the Commission should adopt regulatory policies in this proceeding to insure that communications common carriers will provide reasonable authorized use and joint use options for the press at reasonable charges.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION

THE ASSOCIATED PRESS

COMMODITY NEWS SERVICES, INC.

April 25, 1975

RESPONSE OF
AERONAUTICAL RADIO, INC., AND
THE AIR TRANSPORT ASSOCIATION OF AMERICA

Aeronautical Radio, Inc. (ARINC), and the Air Transport Association of America (ATA), pursuant to the Commission's Notice of Inquiry and Proposed Rulemaking (47 F.C.C. 2d 644 (1974)), hereby submit their joint Response to the Reply Comments submitted in this proceeding.¹

I. INTRODUCTORY STATEMENT

1. The Commission now has before it 38 Reply pleadings, comprising some 350 pages, in addition to the more than 1,000 pages of initial Comments filed in this proceeding. These Comments and Replies set forth the views of a broad spectrum of users, established common carriers, specialized carriers, and the new "value-added" carriers. A review of the other Replies now on file reinforces and confirms the conclusions expressed in the Reply Comments of ARINC and ATA.

¹By Order released March 20, 1975, the Chief of the Common Carrier Bureau set April 25, 1975 as the date upon which Responses should be filed. 40 Fed. Reg. 13341 (1975).

2. There are, however, several Reply Comments which we feel deserve some response, and following a few general observations, we shall take up those matters. Then, in closing, we shall address some of the procedural questions raised by the Commission in paragraph 39 of its Notice of Inquiry (47 F.C.C.2d at 659).

3. As one reviews the Comments and Replies which have been filed, one is impressed with the constructive approach adopted in most of the submissions. While some filings consist of little more than opinion and argument, others make a genuine attempt to submit factual information which will be of assistance to the Commission. ARINC and ATA, in behalf of the air transport industry, have made a major and genuine effort to submit factual background, as well as policy presentations, which should assist the Commission in its review of the difficult issues raised in this investigation. We are troubled, however, that some parties have used terms in a loose and pejorative fashion out of keeping with the careful approach which we believe this proceeding demands. We find in this regulatory inquiry the word "discrimination" being used, if one may pardon the term, indiscriminately. The parties who make most free with the term seem least inclined to analyze its meaning in a legal or regulatory sense. And, where bulk discounts may be involved, the word "subsidy" is repeatedly used without regard to or recognition of the fact that bulk discounts almost certainly increase the contribution to the carrier's net return, thereby benefitting the users of

all of the carrier's services. Similarly, the loose and unsubstantiated charge that this or that entity is an "unregulated common carrier" floats through some of the Comments and Replies.

4. A welcome antidote to some of the extreme remarks in this vein is the policy statement submitted by OTP on the regulatory treatment of "intermediaries" and "communications brokerage," by which latter term OTP includes, broadly, pure arbitrage, sharing, and value-added services. While to one party the growth of intermediaries may be a "cancer" which it desires to have removed from the communications scene, OTP carefully discusses the benefits to the public which such organizations can and do provide. Whatever the Commission may ultimately conclude on the complex issues before it in this proceeding, we are confident it will proceed in the spirit of the larger public interest reflected in the OTP statement. We intend in the next section of this Response to deal specifically with both categories of filings.

II. RESPONSE TO OTP

5. From the air transport industry's standpoint, perhaps the most significant aspect of the OTP filing is that it provides persuasive, reasoned, and objective confirmation that the kinds of functions which ARINC performs in the field of intercity private line communications are in the public interest and should be encouraged. The Comments and Reply Comments which have been filed by the air transport industry confirm, through proven experience, the very benefits which OTP predicts will flow from the activities of intermediaries.

The Comments filed by OTP should put to rest any doubt whatsoever as to whether ARINC's role as "customer" for the air transport industry is in the public interest.

6. The only open question, in our view, with respect to OTP's position is the extent to which the role of unregulated intermediaries should be expanded beyond industry oriented, not-for-profit organizations or associations. Mindful of arguments raised by various of the common carriers concerning the risks of unlimited sharing or resale, ARINC and ATA have emphasized in their submissions the demonstrable benefits of industry oriented organizations, operating not-for-profit, such as ARINC, in providing the benefits of efficient and economical communications. Subject to a few observations below, we leave to the Commission the balancing of the various arguments which have been made on the further question of whether the permitted scope of intermediaries should be broadened beyond this limited concept.

7. OTP recognizes that if unlimited sharing or brokerage activities cause an increase in Telpak rates, "it will increase the attractiveness of private microwave systems to large customers." (OTP Comments, p. 37). However, we feel that OTP has underestimated the likely degree of diversion to private microwave systems and the consequent loss of contribution to AT&T's other services if Telpak rates are increased because of such a policy change. (OTP Comments, pp. 37-38). It is the view of ARINC and ATA that any substantial increase in existing

Telpak rates would result in a substantial diversion to private or other systems,² and thus reduce Telpak's contribution to other AT&T services.

8. Some of OTP's other observations concerning the possible impact of its proposed policy of liberal use of intermediaries deserve comment. In its Comments (p. 31), OTP observes that:

"brokers supplying consumer groups such as user associations are apt to be in very close touch with communication trends among their customers or members and, in order properly to plan their own service, they will exert themselves to make more accurate forecasts of their demand. This activity may actually aid AT&T in forecasting."

We believe that this statement is amply confirmed by the role which ARINC has traditionally played. As "customer" for the air transport industry, ARINC is in continual contact with a variety of common carriers, including AT&T, as to possible new services and offerings which may be responsive to the particular needs of the air transport industry. ARINC has described some of these activities in its Comments (ARINC Comments, pp. 45-50). Whether an intermediary which served a broad spectrum of users having no industry "community of interest" could be as effective is open to question, but certainly an industry oriented intermediary can and does perform this function.

9. Referring to the potential effect on specialized carriers of unlimited brokerage, OTP responds that:

"On the other hand, technically sophisticated user groups and brokers should represent attractive aggregated markets for specialized and satellite carrier services; we note for example that ARINC, which serves as a kind of broker to the airlines,

²See, e.g., Airlines Exhibit 1, pp. 15-20; Exhibit 4, pp. 22-23; AT&T Comments, pp. 27-28.

has ordered lines from at least one of the specialized carriers." (OTP Comments, pp. 32-33, footnote omitted).

This is true, and as set forth in ARINC's initial Comments (ARINC Comments, p. 48 n.28), ARINC has held a number of seminars enabling specialized common carrier representatives and airline communications and computer personnel to interact on industry needs. ARINC regularly makes available to specialized and satellite carriers consolidated industry demand data which can be invaluable to such carriers. That ARINC's utilization of specialized common carriers is not limited to just one carrier is shown by the current figures for specialized and satellite carrier circuits in service or on order, as follows:

<u>Carrier</u>	<u>Circuits</u>
American Satellite	37
CPI	32
MCI	608
RCA Globcom	1
SPCC	380
Western Union Satellite	<u>9</u>
Total as of April 22, 1975	1,067

This represents more than a threefold increase in ARINC's use of specialized and domestic satellite carriers in the past five months. (See ARINC Comments, p. 16 n.12).

10. OTP lists six benefits which it believes would flow from unlimited brokerage. Most, if not all, of these benefits would also flow were brokerage limited to non-profit industry communications companies, such as ARINC. For example:

a. "Equalization of User Opportunities" (OTP Comments, p. 24): The comments of the various segments of the air transport industry show that an important aspect of ARINC's customer status is to make economical and efficient communications available to all levels of the air transport industry and to integrate all competing elements from the largest trunk airline to the smallest commuter air carrier into a unified air transport system to serve the public.

(ARINC Comments, pp. 27 n.24, 46-49; Statement of Air Midwest (ARINC Comments, App. B); Statement of Air Wisconsin (*id.*, App. C); Reply of Altair Airlines).

b. "Expert Management and Marketing" (OTP Comments, pp. 24-25): Similarly, ARINC's Comments and Mathison & Walker, *infra*, pp. 16-17, demonstrate the importance of this factor in the establishment and operation of ARINC's communications services. (ARINC Comments, pp. 14-16, 45-50).

c. "Intensified Utilization" (OTP Comments, pp. 26-27): This has always been an important aspect of ARINC's service in the past, and is a major goal in ARINC's proposed nodal point telecommunications network. (ARINC Comments, pp. 40-41).

d. "Timely Exploitation of Advancing Technology," and "Risk and Innovation" (OTP Comments, pp. 27-28): ARINC's Comments

have explained its past record of being at the forefront of communications technology and the benefits the public has derived from these advanced systems. Similarly, ARINC's current efforts to exploit air-ground data link, private microwave, and voice switching techniques will continue to stimulate not only its services to the air transport industry, but also by its example, the carriers' offerings to the public. (See ARINC Comments, pp. 17-50).

11. Of the six "benefits" to which OTP points, only the one labeled "Cost-Related Pricing" (OTP Comments, p. 21) seems to depend on unlimited arbitrage. But this supposed "benefit" must be examined closely. Carriers should be free to meet the competitive threat posed by private, or other communications systems, and any approach which would curtail or limit this flexibility would be counter-productive. That is, carriers should be free to price their services in response to both costs and market conditions, including the threat of private systems.

12. In sum, as indicated above, we believe the submission by OTP is a persuasive, constructive contribution to this proceeding, and we agree with its summation of the important issue here:

"[T]he remaining question for Docket No. 20097 is whether and to what extent communications brokerage or any form thereof should be freed from present tariff restriction and, if so freed, should be subject to regulation by the Commission." (OTP Comments, p. 2, emphasis added).

III. RESPONSE TO MCI

13. In its Reply, MCI attempts to brush off the submissions of ARINC and the air transport industry with the passing observation that "Aeronautical Radio, Inc. (ARINC) attempts a justification of the single customer provision which is similarly unresponsive to the broad scope of the Commission's inquiry." (MCI Reply, p. 20). Any such suggestion simply ignores the comprehensive Comments submitted by ARINC and ATA, which are in stark contrast to the disappointing dearth of any useful factual material from MCI, either in its Comments or Reply.

14. With respect to the "single customer" issue, the Commission outlined the type of response it hoped to receive from ARINC and others:

"We expect to receive evidence that is 'typical' of the groups that do and those that do not enjoy a single customer status. . . . Such descriptive type information is more conveniently received in written form rather than through oral proceedings." Notice of Inquiry, ¶25, 47 F.C.C.2d at 653.

Responding to that request, ARINC described in great factual detail the communications requirements and uses of the air transport industry, its unique dependence upon an integrated, industry-wide communications system, and ARINC's essential and historic role in meeting these requirements as customer and licensee of the industry's communications system. These Comments were supported in greater detail by statements from the Air Transport Association,

and six³ individual air carriers -- from the very large (United Air Lines) to the very small (Air Midwest).

15. MCI, by contrast, manifests no interest in these requirements, or how they are met by ARINC. Indeed, it does not even acknowledge that factual presentations have been made.

16. Because MCI chose in its Comments and in its Reply to ignore the facts, as indeed it must in order to sustain its position, let us examine its Reply to ARINC's legal arguments. ARINC demonstrated in its Comments that, under all the facts, its request for service from AT&T and other carriers is "reasonable" under §201(a) of the Communications Act, and thus that the carriers have a statutory duty to provide the service requested. ARINC also pointed out that in such a circumstance "discrimination" would arise if carriers refused to provide service to other entities entitled to service, but could hardly arise from an affirmative response to a §201(a) duty to serve ARINC.

17. Nonetheless, without even acknowledging the existence of §201(a) of the Act, ARINC's reliance upon it, or the factual support for ARINC's request for service under it, MCI retreats to the charge that "ARINC has turned item of inquiry no. 9 upside down." (MCI Reply, p. 20). Further, MCI urges the Commission to look at "the single customer

³
Altair submitted its statement in Reply Comments.

practice generally" (MCI Reply, p. 21), but is curiously uninterested in the demonstrations in this record by various industries as to how "single customer" status has or will meet their own communications needs. For example, SIAC's extensive initial Comments, which delineate how it serves the securities industry through its customer recognition from MCI and other carriers, are completely ignored in MCI's Reply.⁴

18. MCI's "specialized" view of the public interest is troublesome, especially in light of its origins. Microwave Communications, Inc., one of the MCI companies appearing here jointly, first applied in 1963 for Commission authority to provide specialized private line communications service in competition with the Bell System. In its decision adopted on August 13, 1969, the Commission seized upon the opportunity to stimulate innovation and to improve service through the grant of authority to MCI to construct a common carrier microwave system between Chicago and St. Louis (18 F.C.C.2d 953).

⁴ ARINC finds itself in a curious posture between the Reply Comments of MCI and those of NRMA. As noted, MCI essentially ignores the detailed Comments of ARINC, saying merely that they are "unresponsive to the broad scope" of the Commission's inquiry, and then urges that what is involved here is the exercise by the Commission of its "general inquiry and broad rulemaking power to investigate the single customer practice generally." (MCI Reply, pp. 20, 21).

On the other hand, NRMA urges that "The issue of expansion or broadening of the concept cannot be reached until the concept itself is first validated for the airlines in a contemporary context," indicating (with characteristic lack of restraint) that it would be "disastrous" to do otherwise. (NRMA Reply, pp. 2, 3). NRMA also, it may be noted, injects the term "subsidy" into the single customer discussion with unjustified abandon. (*Id.*, p. 3 n.1). The balance of NRMA's polemic against ARINC is refuted by material already in the record.

The other MCI companies came into being in the wake of that landmark ruling.

19. In its decision to authorize competition with the established carriers, the Commission was clearly troubled by testimony as to "the lack of flexibility due to the restrictive tariffs of existing carrier systems," and was correspondingly attracted to the possibility of lower rates resulting from the new competition (id. at 960).

20. Yet, MCI in this proceeding attacks AT&T's Telpak rates, saying that it "concurs" in the view that it is "a contrived pricing scheme designed to provide discounts to privileged users . . ." and that, "Telpak is further discriminatory . . . because it has never been shown to be compensatory." (MCI Reply, p. 11). In short, MCI says that it "welcomes the demise of Telpak, whether it would come about through repricing in the marketplace or otherwise." (Id.). Aside from the fact that Telpak rates are not here in issue,⁵ MCI's continued attempts to force communications users to pay higher rates to AT&T are disappointing. By the time MCI began commercial operation in 1971, Telpak rates had risen more than 100% above those in effect when MCI first decided that it could compete successfully with AT&T and had filed for its initial authorization in 1963. Since 1971, AT&T has added two more Telpak rate increases, hardly evidence of a predatory response to MCI's competition.

21. Similarly, MCI alleges that "the single customer concept is basically discriminatory and should be eliminated,

⁵See Memorandum Opinion & Order released October 3, 1974, 48 F.C.C.2d 1077.

or at least regulated very, very closely." (MCI Reply, p. 2). Yet this concept, and certainly ARINC's status, also predates MCI's operation. Moreover, MCI's customer/authorized user provisions are far broader than that of AT&T. (Compare MCI Tariff F.C.C. No. 1, ¶C6.01, with AT&T Tariff F.C.C. No. 260, ¶2.2.1). The type of free competitive response exemplified by MCI's tariff should be encouraged, and certainly the Commission should not erect a protective regulatory umbrella to obviate the need for such favorable competitive responses.⁶

22. In contrast to MCI's arguments, Southern Pacific Communications Company (SPCC) in its initial Comments (p. 16) expressly recognized that:

"Single customer provisions may be found by the Commission to be a just and reasonable classification where the specified groups of users possess unique attributes of unity and central administration which permit the user groups to be considered as a single entity for purposes of tariff application."

In its Reply Comments, SPCC also explains the customer, shared use, and resale provisions in its proposed tariff, which are similar, although not identical, to those of MCI. (See SPCC Reply, pp. 3-6).

23. The raison d'etre for MCI and other specialized and satellite carriers is to provide new approaches to communications services and to establish price and service competition, not to cartelize the communications industry. In

⁶See Specialized Common Carrier Services, 29 F.C.C.2d 870, 915 (1971), aff'd sub nom. Washington Utils. & Transp. Comm'n v. FCC, 30 R.R.2d 1063 (9th Cir., Jan. 20, 1975).

the actual marketplace, these carriers have begun to make varied and innovative responses to the needs of users. Thus, the Commission should avoid any general directive in this proceeding, which could impair future flexibility and preclude the very result which it sought when it decided to authorize specialized and satellite carriers.

IV. RESPONSE TO TELENET

24. Telenet is a new value-added carrier which plans to offer to the public a for-profit data transmission service using private lines obtained under AT&T Tariff F.C.C. No. 260 and, possibly, AT&T Tariff F.C.C. No. 267 in conjunction with its own "packet-switching" computers. Telenet has been granted a certificate of public convenience and necessity pursuant to §214 of the Act. (Telenet Comments, p. 1). Now that Telenet is a certificated carrier, it apparently has concluded that there should be entry regulation to limit its competition, and has, we believe, advanced an unreasonably expansive view of what should constitute "common carriage."

25. With the ease that comes when no legal precedents are cited, Telenet pronounces that ARINC and others are "effectively engaged in unregulated common carriage." (Telenet Reply, p. 7). Ignoring, as it must, the Commission's long tradition of distinguishing cost-sharing, industry-oriented

services from common carriage,⁷ Telenet sweeps within its proposed regulatory net a variety of industry services and joint use arrangements, such as ARINC's service for the air transport industry which owns it, SIAC's service for the securities industry which owns it, RCA's joint use network and the proposals of other industry groups. (Telenet Reply, pp. 4-7).

26. Having thus concluded, without authority or reason, that ARINC is one of those engaged in "unregulated common carriage," and even conceding that ARINC is "in part, at least . . . providing a needed service to its industry, and thereby to the public," Telenet then concludes its argument by pontificating that "that societal judgment should not, however, blind the Commission to the fact that in performing some of these services, ARINC [is] . . . effectively engaged in unregulated common carriage" (Telenet Reply, p. 7).

27. We doubt that the public interest or any other "societal judgments" will "blind the Commission." We anticipate, to the contrary, that the Commission will conclude, as did OTP, that the activities complained of by Telenet not

⁷See ARINC v. AT&T, 4 F.C.C. 155 (1937); Letter from FCC to Counsel for Chicago Board of Trade, dated Jan. 11, 1950 (Pub. Notice 45049, Jan. 11, 1950); Letter from FCC to Counsel for Florists' Telegraph Delivery Ass'n, dated Dec. 5, 1951 (Pub. Notice 70819, Dec. 6, 1951); Cooperative Sharing of Operational Fixed Stations, 4 F.C.C.2d 406, 417 (1966); Special Emergency Radio Serv., 24 F.C.C.2d 310, 314 (1970); Multiple Licensing--Safety & Special Radio Servs., 24 F.C.C.2d 510, 511, 519 n.2 (1970). Cf. Preston Trucking Co., 31 F.C.C.2d 366, 371 (1971). Compare Letter from Acting Chief, Common Carrier Bureau, to Scantlin Electronics, Inc., with that to Timeplex, Inc., both dated Feb. 5, 1971. See also OTP Comments, pp. 3-16.

only are good, but that they need not and indeed should not be fettered with unnecessary common carrier regulation.⁸

28. Finally, we find Telenet questioning the unregulated status of ARINC's message switching services (ESS), even though it admits that this aspect of ARINC's overall operations is "tangential to the main thrust of this proceeding." (Telenet Reply, p. 9 n.3).

29. The nature and status of ARINC's message switching services are, of course, well known. In the much respected treatise by Stuart L. Mathison & Philip M. Walker, Computers and Telecommunications: Issues in Public Policy (1970), ARINC's ESS was described as follows in the section entitled, "Non-Carrier Message Switching Services" (p. 51):

"A third category of message switching systems is termed industry-oriented; subscription to such a system is limited to members of a given industry, who may then use the system for communications with one another. . . . At present, common carrier tariff restrictions on resale of communications channels . . . have barred non-carriers from offering complete 'package' (i.e., lines plus switch), industry-oriented message switching systems. An exception is the message switching service which the FCC has permitted Aeronautical Radio, Inc. (an unregulated private firm) to offer to members of the commercial airlines industry. Due to a number of factors, such as lack of familiarity with the business operations and consequent specialized data communications requirements of various industries, and a

⁸ In passing, we note that Telenet suggests that the air transport industry's need for ARINC's role in intercity communications services has lessened since the time of the FCC's decision in 1937 which affirmed ARINC's customer status, and cites language in the Commission's Hearing Order in Docket 19746 as support. (Telenet Reply, pp. 8-12). The contrary is true, as is shown not only in the initial Comments of the air transport industry parties, but in the specific response to this question in the ARINC/ATA Reply Comments at pp. 12-14.

traditional degree of insensitivity to the demands of communications submarkets, the common carriers presently offer no industry-oriented message switching services as we have defined them. Thus, the market for such services remains an untapped business opportunity."

30. Lest it be thought that Mathison and Walker viewed the unregulated status of ARINC's ESS with alarm, they later state:

"A possible arrangement would allow industry groups to develop their own communication systems, or contract with a private firm (or carrier) to provide the system. An example of the type of relationship which we feel should be encouraged is that between the airlines industry and Aeronautical Radio, Inc. (ARINC) which, as has been mentioned earlier, operates a specialized message switching communication system for the subscribing airline companies." Id. at 69, emphasis supplied.

31. While the above observations are not determinative, they do reflect the recognition and approbation given to ARINC's unregulated message switching services in a respected treatise some five years ago. Further, we welcome Telenet's attempts to tap some of the "untapped business opportunity" which Mathison and Walker foresaw in 1970. But we do resist the philosophy which both Telenet and MCI espouse in an attempt to enhance their own interests -- a philosophy which threatens to upset existing, satisfactory working relationships within various industries.

32. Finally, any suggestion that the Commission's decision in its Computer Inquiry requires a change in the regulatory status of industry oriented, cost-sharing message switching services such as ARINC's ESS is mistaken. The Commission expressly had under consideration "a public offering

of communications services" when it dealt with its regulatory powers and obligations toward message switching.⁹ There is no indication, explicit or implicit, in its decision that it intended any change in its long standing policy of non-regulation of not-for-profit industry-wide communications services, whether or not computers are involved.

V. PROCEDURAL RECOMMENDATIONS

33. The Commission in paragraph 39 of its Notice of Inquiry has instructed the parties that "[s]hould participants believe that further proceedings, including oral hearings are needed to develop a sufficient record for the resolution of particular issues," the request for such proceedings should be incorporated in this pleading (47 F.C.C.2d at 659).

34. In view of the thorough consideration which has been given in the voluminous record made in this proceeding to date to the questions posed in the Notice of Inquiry, we are doubtful that any further proceedings are necessary before adoption of a final Report and Order terminating this investigation on the ground that no regulatory "remedy" has been shown to be necessary. However, to the extent further proceedings may be necessary or desirable, the nature of those proceedings would depend upon the specific issues involved. This is so because the Notice of Inquiry encompasses

⁹ Computer Inquiry, Final Decision, 28 F.C.C.2d 267, 278 (1971).

such a wide spectrum of issues ranging from the broad question of what future regulatory policies should be adopted toward value-added carriers, to the narrow issue of whether or not the "use" provisions of ¶2.2.1 of AT&T's and Western Union's respective private line tariffs are unreasonably discriminatory.

35. Thus, for example, should the Commission elect, on the basis of the current record, to propose specific regulations which would recognize that value-added carriers require only minimal regulatory procedures, it would appear appropriate to do so through a Further Notice of Proposed Rulemaking in this case, with full right of interested parties to comment thereon.

36. On the other hand, the issues of possible discrimination under §202(a) or prescription under §205(a) of the Act, especially insofar as they relate to the "single customer" clauses contained in respondents' existing tariffs, present an entirely different legal/procedural situation.

37. First, the record establishes that ARINC's request for service is "reasonable" within §201(a) of the Act, and hence that the carriers have a duty to provide current service to ARINC. (See ARINC Comments, pp. 52-66). Therefore, to the extent that any party feels discriminated against, the appropriate recourse would be to determine whether any such customer which had requested service had been unlawfully refused service under §201(a). Such a determination

would, obviously, require a separate proceeding to which the pertinent carrier or carriers and any party which had sought and been refused service would be indispensable parties. (The record in the present proceeding does not indicate that any party to date has filed an order for service which has been refused by a carrier.)

38. Similarly, if the Commission were to attempt to focus on AT&T's tariff clauses contained in ¶2.2.1 in the context of §202(a), to the exclusion of §201(a) -- which in the view of ARINC and ATA, it cannot do -- a formal evidentiary hearing would be required.

39. As ARINC pointed out in its Comments (pp. 62-63, footnotes omitted):

"The basic ingredients of the concept of 'discrimination' have been well established under the much litigated provisions of the Interstate Commerce Act from which §202(a) was drawn. That is, it must be shown that a common carrier has (a) charged different rates or accorded different treatment to (b) two or more customers (c) in the rendering of a like and contemporaneous service (d) under substantially similar circumstances and conditions.

"But it is not even 'discrimination' which is disfavored by the Communications Act, rather, as the courts have emphasized, only 'unjust or unreasonable' discrimination. Thus, even a discrimination in rates may be justified by cost considerations, by differences in the classification of 'customer groups,' or because of competitive market considerations."

40. Clearly, the unique history and needs of the air transport industry as detailed in this proceeding show that no other customer participating in this proceeding operates

under substantially similar circumstances and conditions."¹⁰

41. Further, there has been no showing herein that any other private party presents a like competitive threat of providing its own privately operated communications system if the efficiency and economy which its "customer" status provides were removed.¹¹ Consideration of competitive necessity is essential in a §202(a) proceeding.¹² Carriers in this proceeding recognize the need to meet competition from private microwave systems,¹³ and it is unchallenged that such a competitive threat exists from the airline industry.¹⁴

¹⁰ With respect to the motor carrier industry's desire to achieve single customer recognition, ARINC/ATA noted in their Reply Comments (p. 9 n.7) that this should be based on a showing of its own unique communications needs and structures rather than a boot-strapping allegation of "discrimination." The fact that the airline industry and the motor carrier industry (as well as private automobiles, rental cars, and rental trucks, for example) compete to some degree for passengers and cargo is beside the point, especially where, as here, no competitive injury has been shown.

¹¹ The American Trucking Associations, for example, concedes that it "chose not to make operational its planned nation-wide private microwave system for the threshold reason that members did not and do not have the technical personnel necessary to install or operate such a private microwave system." (American Trucking Associations Comments, p. 5.

¹² Telpak, 37 F.C.C. 1111, 1115 (1964); Telpak Sharing, Recommended Decision, 23 F.C.C.2d 639, 648 (1969); see Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944); ICC v. Alabama Midland Ry., 168 U.S. 144 (1897).

¹³ AT&T Comments, pp. 27-28; GT&E Comments, p. 30; RCA Globcom Comments, p. 12; SPCC Comments, p. 15. See also MCI Comments, pp. 12-13, 23; Western Union Comments, p. 6 n.6.

¹⁴ See Airlines Exhibit 1, pp. 15-20; Exhibit 4, pp. 22-23; ARINC Comments, pp. 41-45; AT&T Comments, pp. 27-28.

42. The Commission's own recognition of the parity between ARINC's customer status (as contrasted with "sharing") and its role as licensee of a competitive private microwave system is worth repeating:

"Under the single customer concept in Telpak, ARINC, as the customer, could order the appropriate Telpak configurations and circuitry and then assign circuits to the airlines as their needs required. This is the same role that ARINC could perform as the single licensee of a private microwave system. On the other hand, the testimony was that shared Telpak is not comparable to either such single licensee private microwave or Telpak with a single customer feature, in terms of efficiency and flexibility. Under shared Telpak, the testimony was that it is often necessary for sharing parties to anticipate their communications requirements by ordering 'spares' to accommodate such potential requirements, whereas this situation would not arise under either Telpak with a single customer feature or under a single licensee private microwave system. Additionally, under shared Telpak, if the airlines' requirements are not sufficient to justify a Telpak rate, ARINC states that it notifies the airlines that it does not have enough requirements to justify Telpak, whereas under a Telpak single customer arrangement, it would be possible to fulfill all of the airlines' communications requirements, thereby providing the kind of efficiency and flexibility available under a private microwave alternative." Telpak Sharing, 23 F.C.C.2d 606, 610-11 (1970).

43. Thus, even if one were to hypothesize that "discrimination" existed, the determination of whether that discrimination was "unjust or unreasonable" would necessarily require a full evidentiary hearing to establish the pertinent facts.

44. Clearly, then, any action the Commission might wish to take, pursuant to §202(a), adverse to ARINC's current "customer" status under existing AT&T tariffs could

¹⁵ See cases cited note 12 supra.

lawfully come only after a full evidentiary hearing. This is all the more so because the record made to date affirmatively justifies the treatment of the aeronautical communications handled by ARINC as a separate "classification" of communications under §201(b) of the Act. In this connection, the United States Court of Appeals for the D.C. Circuit has observed that:

"[t]he Commission, as we have said, is statutorily empowered to classify the press separately from other customer groups, and to establish different charges for press and nonpress communications, subject to the requirement that the rates thus prescribed be just and reasonable, and the further requirement that undue or unreasonable discriminations and preferences be avoided. Standing alone, neither the fact of separate classification nor the fact of a difference in tariff charges exerts any real tendency to demonstrate a collision with the statutory provisions." Associated Press v. FCC, 425 F.2d 1290, 1301 (D.C. Cir. 1971) (footnote omitted, emphasis added).

45. Similarly, any prescriptive action which the Commission might take, under §205(a), adverse to ARINC's customer status could not legally be accomplished merely by a "notice and comment hearing," but instead would require "full opportunity for hearing."¹⁶ The United States Supreme Court has

¹⁶

Section 205(a) provides as follows:

"Whenever, after full opportunity for hearing, . . . the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions in this Act, the Commission is authorized and empowered to determine and prescribe . . . what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, . . . shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

long ago interpreted that section's forerunner,¹⁷ §15(1) of the Interstate Commerce Act, as requiring an evidentiary hearing.¹⁸ ICC v. Louisville & Nashville R.R., 227 U.S. 88 (1913).

46. The Court has interpreted the requirement of §15(1) of the Interstate Commerce Act of a "full hearing" as mandating the ICC to afford all parties an opportunity to submit evidence, cross-examine witnesses, inspect documents, and offer rebuttal evidence. Specifically, the Court held:

" . . . the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. United States v. Baltimore & O.S.W. R. Co., 226 U.S. 14." Id. at 93-94.

47. These principles remain valid today. The recent cases of United States v. Allegheny-Ludlum Steel, 406 U.S. 742

¹⁷

See S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934).

¹⁸

The Third Circuit in Bell Telephone Co. v. FCC, 31 R.R.2d 477 (3d Cir., Sept. 11, 1974), did not reach the Commission's purported exercise of authority under §205(a) without an evidentiary hearing but rather affirmed its authority to order service under §201(a). Section 205(a) requires "full opportunity for hearing" while §201(a) only requires an "opportunity for hearing."

(1972), and United States v. Florida East Coast Ry., 410 U.S. 224 (1973), involved §1(14)(a) of the Interstate Commerce Act and do not limit the requirements laid down in ICC v. Louisville & Nashville R.R. for proceedings under §1(15) of the Interstate Commerce Act and its progeny §205(a) of the Communications Act. Section 1(14)(a), like §201(a) of the Communications Act, calls for only a "hearing" without more; whereas §15(1) and §205(a), respectively, require a "full hearing" and a "full opportunity for hearing." Congress clearly intended a more rigorous procedure to be applied in cases arising under these latter sections or it would not have employed the all-encompassing adjective "full."

48. In light of the vague, frequently gratuitous, and always undefined use of the term "discrimination" by a number of parties to this proceeding, our views with respect to these procedural questions are summed up in the following comment of the United States Court of Appeals for the Second Circuit on the quest for "non-discriminatory" tariff alternatives:

"The quest for the latter [a non-discriminatory tariff] has been handicapped by premature statements (without benefit of evidentiary hearings, either through prescription under §205 or challenge under §202) characterizing at least one of the alternatives as unjustly discriminatory." National Ass'n of Motor Bus Owners v. FCC, 460 F.2d 561, 568 (2d Cir. 1972) (emphasis added).

VI. CONCLUSIONS

49. The record herein reflects a user consensus that liberality and flexibility be the rule with respect to sharing and joint use of common carrier services and facilities. ARINC and ATA believe the Commission should indicate that it favors this trend, but leave to the forces of the marketplace the determination of the nature and degree of such relaxation. If the Commission chooses to adopt this course, no further proceedings appear necessary, and this investigation may be concluded by the adoption of an appropriate Report and Order to that effect.

50. ARINC and ATA also favor minimal regulation of "value-added carriers" and believe that should the Commission wish to adopt specific new regulations addressed to value-added carriers, this could be accomplished within the framework of this proceeding by a Further Notice of Proposed Rule-making, with full opportunity for comment by all.

51. The role of industry "intermediaries" should be viewed affirmatively. The customer status of other industry oriented, not-for-profit service organizations should be determined on a case-by-case basis by communications common carriers, with such assistance as may be needed through resort to Commission processes. Whether virtually unlimited arbitrage should be encouraged is a question which requires close scrutiny and a careful balancing of the interests of the carriers, the users, and the public generally to make certain that valid competitive objectives are not self-defeated.

52. The record in this hearing fully justifies the current service to ARINC as the "customer" of each carrier under its tariffs in fulfillment of that carrier's duty under §201(a) of the Act. Further, in that connection, there has been no showing of "unjust or unreasonable" discrimination under §202(a) of the Act, nor any basis for concluding under §205(a) that it would be "just, fair and reasonable" for the Commission to take any prescriptive action which would impair ARINC's present role for the air transport industry. In any event, moreover, lawful implementation of action under either §202(a) or §205(a), adverse to ARINC and the air transport industry would require a full, prior evidentiary hearing.

Respectfully submitted,

AIR TRANSPORT ASSOCIATION
OF AMERICA

AERONAUTICAL RADIO, INC.

April 25, 1975

RESPONSE OF
AMERICAN TRUCKING ASSOCIATIONS, INC.

1. This is the Response of American Trucking Associations, Inc. (ATA) to the Reply Comments filed herein on or about February 24, 1975 by thirty-six or more interested parties. ATA has both a general and a special interest in these combined dockets. Its general interest is in preservation and improvement of the extraordinarily useful public telecommunications system now available to ATA, its membership and the

general public; its special interest is in the achievement of a parity of treatment by AT&T for inter-city regulated truckers with the airline industry.

2. In its February 24, 1975 Reply Comments, ATA fairly met and discussed all of the relevant and material issues which were raised in the first-round Comments, and suggested a comprehensive and integrated series of regulatory actions which the Commission could take safely to achieve a balance of interests under reasonable regulation. Except for the proposal of the Office of Telecommunications Policy of the Executive Office of the President (OTP), which is discussed in some detail hereafter, no ideas new in these Dockets emerged from the Reply Comments, except those proposed by ATA. Considering the present state of telecommunications shared use, it is respectfully suggested that the ATA Reply Comments of February 24, 1975 is the most useful document on file herein from which the Commission can proceed to resolve the extremely important matters now at issue. ATA respectfully requests the Commission to review its Reply Comments.

3. In this Response, ATA will discuss the Reply Comments of OTP, which suggest a heretofore undiscussed "solution" to the shared use problem, and those of such other participants as directly opposed the positions of ATA; and will explain again the inter-city trucking industry need for single customer status.

OTP PROPOSAL-GENERAL COMMENTS

4. OTP suggests what is superficially an attractive solution to the sharing problem, and one which would achieve parity of treatment between regulated inter-city truckers and regulated inter-city air transportation carriers, i.e., unlimited sharing accomplished through unregulated resale of service by telecommunications brokers. But, although the OTP suggestion would accomplish ATA's objective of achieving parity of treatment with regulated inter-city airlines, ATA does not support it, because it fails to recognize the business pressures of the world as it is, and would result in decades of chaos for all telecommunications users, including ATA and ATA's membership.

5. OTP suggests that all restrictions on shared use and resale of telecommunications service be removed, to encourage the emergence of a communications brokerage industry which OTP hopes might better serve the public, using general common carriers (GCCs) as wholesale sources of communications facilities. A parallel is drawn to what OTP appears to feel are the salutary results of such a policy in the freight forwarding business.

6. Of the more than seventy comments which have been filed in this proceeding by persons and organizations who have intensive interest in telecommunications services, only OTP has proposed a "solution" which calls for a complete reworking of the existing financial arrangements

between telecommunications users and suppliers. It cannot be denied that our national communications system might have been built to function on some financial arrangements radically different from the one that now exists; but neither can it be denied that our national communications system is a going business, not subject to redesign ab initio. The revenues which make the operation of the system possible day-by-day are secured through imposition of charges for services as described in present complex tariffs, which charges have been set taking into account not only cost considerations but also market considerations, such as "optimum overall return", "value of service" and "what the traffic will bear". Were the present shared use and resale provisions simply entirely removed, AT&T would be called upon, essentially, to rent facilities to brokers always on a cost-controlled basis. Rates would have to be drastically restructured for a fair return on each facility, to avoid wholesaler financial distress. Without area-wide cost/revenue-relationship averaging and opportunities to price services for optimum overall return, service to non-urban areas would be prohibitively expensive. The OTP suggestion would carry "cream skimming" to its ultimate conclusion, which would result in the drying up of the availability of much of the whole product from which cream can be skimmed.

OTP PROPOSAL-POINT BY POINT ANALYSIS

7. OTP, in its cover letter to its pleading titled "Regulatory Treatment of Communications Brokerage" noted that the Council of

Economic Advisors has suggested that it is important to look for ways of lessening regulation. However, the Council did not suggest that the forces of unrestrained competition, if brought into play, would permit the government to wither away -- that regulation of over-ambitious, over-enthusiastic and under-capitalized entrepreneurs in public utility businesses is no longer necessary to protect the public from chronic instability of essential services. There presently exists in some quarters a loud clamor for "injection of competition" into regulated monopoly services, and toward de-regulation when "the benefits of improved economic performance outweigh... sacrifice of other objectives". (OTP cover letter, p. 2.) It is obviously important that actions to effectuate a policy of regulation abandonment be considered as fully and as carefully as were the actions previously taken to institute the regulation. Indeed, considering the quality of telecommunications services now available to United States residents, any drastic disturbance of the basic FCC Title II regulatory ground rules now existing should be undertaken with even more care. There exists a reasonable presumption that past FCC Title II regulation has been very successful, alleged ICC and CAB problems notwithstanding. It is not enough to consider only the generality that less regulation would be wonderful, it is necessary also to consider in great detail the particular circumstances surrounding current FCC regulatory practices before discarding them, to avoid throwing the baby out with the bath water. The policy advocated by the Council of Economic Advisors is not contrary to this view.

8. Regulatory Treatment of Communications Brokerage, Office of Telecommunications Policy, Executive Office of the President, February 24, 1975, page 3, hereinafter abbreviated as "OTP p. 3" proposes full elimination of sharing and resale tariff restrictions and full stay of Commission powers to control entry into the telecommunications brokerage business. ATA suggested a more safe and practical FCC-controlled movement in the same direction. (Reply Comments of American Trucking Associations, Inc., filed February 24, 1974, paragraph 13, hereinafter abbreviated "ATA, ¶13".) The fundamental difference in the approaches is that OTP would permit anyone, and any number of people, with or without knowledge, integrity or capital, to perform all but the facilities-construction functions of a GCC, a Specialized Common Carrier (SCC), a Radio Common Carrier (RCC), a Packet Common Carrier (PCC), or a Limited Common Carrier (LCC); and OTP would permit anyone or any number of people simply to resell any of the services of any of the regulated carriers, using whatever means may be privately convenient. The ATA approach would retain a loose-leash Commission control over new entries, a control which would presumably exclude persons with no demonstrable knowledge, integrity or capital; and a leash which could be tightened when and if the number of potential entries exceeded reason. The ATA proposals did not contemplate outright straight brokerage of common carrier services, but the potential for Commission Rule Making as to ICCs proposed by ATA would permit the Commission to accomplish essentially the same result, when and if it chose to do so,

simultaneously limiting entries to knowledgeable persons whose plans and capabilities would be disclosed to the Commission, and to the Commission-authorized common carriers, in advance.

9. OTP acknowledges that "If communications brokerage activities were deemed to be common carrier functions, the Commission...would have no alternative but to require Section 214 certification." (OTP pp. 9-10.) OTP reasons, however, that persons who resell common carrier services need not be called common carriers under the Act. (OTP pp. 3-16.) ATA reasoned that such resale is in fact common carriage. (ATA ¶10.) OTP admits that its position in this matter differs with previous Commission decisions (OTP p. 3). ATA submits that it and the Commission have properly interpreted the Act, and that OTP is attempting to redefine out of existence a part of the real world. It also appears that OTP, at page 16 of its paper, may consider its own argument inoperative, since it seems to imply there that there is some difference between legal authority to impose restrictions on entry and to undertake other common carrier regulatory functions, possibly enforcement of tariff requirements. If this is a suggestion that a broker may be defined as a non-common carrier for entry purposes, but later be regulated as a common carrier with respect to rates and conditions of service, the Commission should reject the suggestion out of hand as legally unsound.

10. OTP states that the sole justification for regulation of entry, rates and practices is the presence or likely emergence of monopoly power. (OTP p. 13.) Whether or not this is a theoretical ultimate academic truth in the time frame of infinity, it is at best a simplification which disregards the lessons of history and overlooks the public inconvenience and injury which occurred in the communications industry (and in the trucking industry) before government regulation controlled entry, rates and practices. As a practical matter for the public -- utility service users -- the benefits of regulation are primarily the assurances it provides for universal availability and stability of service when needed. The public's need for a stable, ready-on-demand, nationwide communications system is, with some exceptions, being met at this time. The system, although not perfect, functions better than any other known system. Various steps have been taken or are under way to create or strengthen competitors of the Bell System, including the yet developing RCC, SCC, PCC and domestic satellite programs. Interconnection of customer provided "certificated" equipment has been authorized in principle, but not yet accomplished. The United States Department of Justice is proceeding against AT&T, investigating possible anti-trust violations. Ongoing proceedings in each of these areas are expected ultimately to result in significant changes increasing competition. Hopefully, these changes already underway will reduce costs and will encourage additional services without seriously upsetting the present telecommunications service structure.

11. OTP points out that the communications brokerage business could be entered or exited with ease, since no significant investment is required. By estimating a \$500 million yearly potential market for Packet Common Carriers who do more than provide brokerage, OTP concludes that no regulation of resale brokers is required, finding that even if ten "brokers" should share the market considered, there would likely be business enough for each to operate cost effectively. (An Analysis of VANS Breakeven Points, VANS Cost Characteristics, OTP.) The problem with this reasoning is that the \$500 million might be shared by 500 brokers, rather than ten, if there is no form of entry control, and that each time one of the 490 unneeded brokers failed, its communications users would be seriously inconvenienced and injured. OTP may itself recognize this problem; at page 3 of its "VANS Cost Characteristics" it refers to "limited open entry", and that is exactly what ATA proposed; entry of Limited Common Carriers should be controlled by loose-leash FCC regulation. (ATA Reply Comments.)

12. OTP suggests that unlimited brokerage would tend to reduce GCC opportunities for cross subsidization. The objective of such a limitation certainly is proper where specific non-competitive monopoly services are overpriced in order to underprice competitive services. But the solution cannot be found in forcing the telephone industry into a straight cost/price relationship. Rate setting is infinitely more complex than simply calculating costs and adding markups. Of necessity, specific cross subsidization problems must be handled on an informed and reasoned individual basis, as the Commission has handled such problems in the past.

13. OTP forecasts of improvements under headings of "Equalization of User Opportunities", "Expert Management and Marketing", "Intensified Utilization", "Timely Exploitation of Advanced Technology", and "Risk and Innovation" are equally foreseeable under the loose-leash FCC regulatory approach suggested by ATA, without exposing the public to the dangers of unlimited resale.

14. OTP suggests that wholesale carriers may respond by instituting "internal brokerage" practices. How this would differ from present practices of relaxing sharing under tariffs, or how it could be accomplished in any other way was not explained by OTP, although OTP did comment that such stimulation "...may well be one of the most salutary effects of the proposed policy." (OTP p. 29.) It is no doubt true that injection of competition is likely to spur the GCCs to institute new customer options, a process which is occurring in the interconnection field, but it would be no more appropriate to eliminate all resale restrictions at this time than it would have been to eliminate all opportunities for telephone companies to protect the electrical integrity of their plants at the time of the Carterfone Decision. Again, ATA's more conservative proposals should have the same effects, while limiting the dangers to manageable proportions.

15. OTP suggests that Western Union might be permitted to spin off to unregulated affiliates certain of its services, presumably to permit it to survive the shock of unlimited resale. It has been noted by OTP at page 32 that Western Union already carries on a significant

portion of its business as an intermediary, since it makes extensive use of AT&T facilities. However, Western Union's use of AT&T facilities is interwoven with use of Western Union's own facilities, and it is difficult to understand how Western Union could be de-regulated at this late date in view of the agreement that the Act requires regulation of entities which are common carriers. (OTP pp. 9-10.)

16. OTP concludes that if its proposals drive the SCCs out of the market, the benefits of permitting unlimited resale will justify it. (OTP p. 34.) Thus, OTP would be willing to substitute brokers for SCCs to provide competition to AT&T, although the impact of SCC services has not yet been permitted to be felt to any significant degree. Even if permitting unlimited brokerage were a better tool to create AT&T competition than was the creation of SCCs, which ATA denies, the suggestion that brokers could be substituted for SCCs now is untimely, to a fatal degree.

17. OTP also acknowledges that presently authorized PCCs may have "additional competition". This class of common carrier is even newer than SCCs, and their potential for public service even less developed. OTP's willingness to sacrifice the benefits to the public just now emerging from SCC and PCC operations underlies the reason for ATA's basic opposition to the OTP suggestions. They would create a degree of instability in the communications industry which would be intolerable for users.

18. A fundamental flaw in OTP reasoning is illustrated by the discussions of broadband and TELPAK rates at pages 23 and 41. There, OTP concludes that if rates for services susceptible to brokerage are not carrying their proper cost-related share of the revenue load, the carriers will alter the tariffs; thus, of course, making the carrier's own single channel services more attractive and eventually putting the brokers out of business. If one proceeds on the reasonable premise that rates would be adjusted by AT&T so as to reasonably limit resale, and thus control or eliminate brokerage competition by pricing, its only remaining means of accomplishing that end, does it not follow that AT&T will do just that, effectively; and that the sacrifice of SCCs, FCCs and Western Union, all of whom presently and prospectively make contributions far beyond those of a broker, will have been in vain? Users would be back at square one. AT&T would emerge from the shake-down which followed the effectuation of OTP's plans as the only national supplier of telecommunications, which is the opposite result of the one intended.

19. This Commission has been a leader in withholding unnecessary regulation and in permitting competition to enter its fields of regulation. It is probable that when the Council of Economic Advisors commented that governmental agencies should seek to lessen regulation, it was speaking as the Commission's student, rather than attempting to be its teacher. ATA suggests that the public's need for continued universal

availability and stability of telecommunications services is such that the Commission should move very deliberately in expanding resale provisions of common carrier tariffs, so the effects on public service can be controlled. The Commission as yet has no knowledge of the cumulative competitive effect which a full realization of the potentials of interconnection, RCCs, SCCs, FCCs, domestic satellites, and newly suggested LCCs will have on Bell System services and revenues. Each of these methods of permitting additional competition to exist requires more regulatory work by the Commission to achieve the intended results. It would be a disservice to users at this time to go beyond adopting the LCC suggestion of ATA in permitting resale of telecommunications services.

RESPONSE OF REPLIES OF NRMA AND TELENET
CHALLENGING THE LEGALITY OF "SINGLE CUSTOMER" TREATMENT

20. In the first-round Comments, Docket 20097, DATRAN took the position that "single customer" status allowed by AT&T Tariff FCC 260, paragraph 2.2.1 is prima facie unlawful. (DATRAN Comment, p. 34.) No other party took such a position. In the second-round Reply Comments, NRMA and TELENET have more-or-less joined DATRAN, in that they characterize single customer status as "unlawful" and "unreasonable discrimination" respectively. Summaries of the positions of these three objectors to single customer status are as follows:

DATRAM

Single customer treatment is prima facie unreasonable discrimination on the same reasoning that found limited TELPAK sharing unlawful. The reasoning of ARINC v. AT&T, 4 FCC 155 (1937) which justified single customer status for ARINC is no longer valid. Only organizations which substantively enrich primary carrier services should be permitted to furnish services to others, and then only after Section 214 justification has been approved by the Commission.

NRMA

In its first-round Comment, NRMA endorsed the single customer concept and urged its extension to include voluntary associations within very broad industry groups (such as retailers) where the members are not certificated as common carriers or closely regulated, and have no special need to communicate with each other. In the Reply Comment round, NRMA reversed its position with respect to the single customer category; spent its entire energies arguing that ATA was not entitled to single customer status; and that extension of such status would amount to requiring other users to subsidize the communications costs of ATA members.

TELENET

TELENET sees in any expansion of single customer use the demise of TELPAK, which it believes should be considered "on the merits of Telpak, not ind". TELENET suggests that ARINC should be permitted to co. as a single customer only if Section 214 certification is found proper and is extended to it.

21. MCI has taken a less drastic, but essentially parallel position, in that it argues in its Reply Comments that: "The Commission...should require each new party desiring such treatment [single customer status] to seek authorization and to justify its request with a strong public interest showing." (MCI p.2.)

22. The position DATRAN originally took, like the positions now taken by TELENET and MCI, apparently see justification of single customer status being dependent upon a Commission finding of public convenience and necessity in a Section 214 setting. None of the adverse single user comments address the problem of the special needs of the members of the existing single customer groups to communicate reliably between themselves -- needs which have been well illustrated by the Utilities Telecommunications Council (UTC) in its Reply Comments. An essential ingredient for recognition as a single customer is a public interest need for intercommunications between members of the user group to be recognized as a single customer. The DATRAN, MCI and

TELENET suggestions that single customer status should involve a conscious Commission decision that such status does fulfill a public interest need does not differ in substance from ATA's Reply Comments position, wherein it said: "But it seems apparent that some Commission guidance to AT&T with respect to its ad hoc additions to the single customer group at this time is indicated...." (ATA p. 14.) The methods for securing Commission approval of single customer status suggested by DATRAN, TELENET and MCI differ from those proposed by ATA. The three carriers suggest a Section 214 proceeding. ATA suggested "Commission guidance" as to AT&T's ad hoc extensions of this status, without detailing a specific procedure for the giving of such guidance. ATA had in mind that Commission acceptance of new tariffs without suspension would suffice as "Commission guidance".

23. ATA views NRMA's changed position as a de facto recognition of the validity of ATA's position in its first-round Comments, wherein it was pointed out that it is in the public interest only for certain restricted government and regulated industry units which have urgent needs for communications between themselves to be afforded single customer status primarily to permit a close-knit industry to develop and operate effectively. Such restrictions would exclude loose-knit groups of retailers from qualifying as single customers. Most of NRMA's energies in its Reply Comment are mis-directed to the proposition that ATA is seeking to operate a network to serve all of its members.

No fair review of the pleadings in Dockets 19746 and 20097 could sustain this view of the ATA position. ATA seeks to build and operate a single customer network to serve certificated inter-city motor carriers who are directly competitive to certificated inter-city airline carriers who enjoy the same status. (For example, see ATA Comment, December 11, 1974, paragraph 30(d). ATA's operation of its inter-city highway communications/data system will be through its non-profit subsidiary, Highway Radio, Inc., or a similar entity which serves eligible certificated end users only.)

24. AT&T adversely comments upon ATA's desire for single customer status suggesting that ATA's objective is simply a savings of \$17 million per year in communications costs. While it would be sophistry for ATA to suggest that it is not interested in reducing communications costs for its members, had AT&T understood the very next paragraph in ATA's Comment after the paragraph in which ATA gave the \$17 million dollar figure (to show cost discrimination favoring airlines) it would have seen that ATA anticipates spending this savings and much more with AT&T in developing a communications system similar in function to the ARINC system to further increase the efficiency of inter-city trucking operations. Thus, at ATA Comment ¶43, it was said:

"These savings would permit the trucking industry to develop sophisticated communications/information systems to coordinate and control its operations. Systems to handle dispatching,

administration, billing, safety, schedule, and shipment routing and tracing which are economical enough to use would allow the entire trucking industry, small as well as large companies, further to increase the efficiency of its operations, while also enhancing its ability to compete fairly with the airlines for freight shipments. The resulting greater productivity could lower the per unit cost of operation, which would benefit the shippers and hence the public at large."

ATA reiterates that its Comments should be read to mean that the entire inter-city regulated trucking industry would share use of the network in operating their airline-competitive services.

25. TELENET's fear that any extension of the single user concept would so adversely affect carrier revenues as to cause the demise of TELPAK is unwarranted on the record. No carrier offering TELPAK service has made such a suggestion. AT&T has indicated its willingness to continue to consider ad hoc additions to its various arrangements, including single customer status, and has rejected as destructive of TELPAK unlimited sharing only.

26. NRMA's fear that extension of single customer status to ATA would require other communications users to subsidize the communications costs of ATA members is groundless. When single customer status is achieved, ATA intends to expand the communications usage of inter-city

motor carriers by constructing a network not now in existence to carry out operations not now practical. ARINC did the same for the airline industry. As ARINC said (Comments p. 46):

"Many services now provided by ARINC, or now in planning, could not practicably be provided if the various air carriers individually were the customers for the services."
(Emphasis added.)

And as ATAA* said (Comments p. 12):

"The availability of bulk communications services at reasonable rates already has greatly facilitated major improvements in all aspects of the airline industry's functions, and it has been a primary factor contributing to development of specialized personnel and specialized methods committed to more effective and more efficient performance of the airlines' missions." (Emphasis added.)

Communications carrier revenues from ATA members will be larger, not smaller than at present, and it is predictable that the growth in communications use will be such that additional overall contribution to telecommunications carrier profits from trucking industry circuits will be significant within a short time. The Commission can take

* Air Transport Association of America

Official Notice of the fact that economy in communications under circumstances which make expanded communications useful most frequently results in rapid growth. Such would be the intentions of ATA and the inter-city industry it wishes to serve as a single customer. The inter-city regulated trucking industry needs and deserves an opportunity, on a parity with airlines, to take advantage of new methods which are not practical if the various carriers individually are the GCC customers.

27. ARINC, ATAA, SIAC and UTC all have previously explained in their Comments that there are some intra-industry functions which their industries simply could not accomplish if single customer treatment were not now available to them. ATA has similarly explained to AT&T and the Commission that the administrative difficulties of GCC channel installation, use, control and rearrangements alone are such problems in a large and complex network not afforded single customer status as to make such networks as are operated by ARINC otherwise completely impractical.* Costs completely aside, ATA cannot administratively install, control, operate and expand its needed inter-city trucking industry network until it is afforded single customer status.

28. In its Reply Comment, ARINC suggested that ATA should be justifying its request for single customer status based upon its own needs and structures, rather than on its competitive position vis-a-vis the airline industry. On the other hand, AT&T, in its letter of

* Letter to C. Duane Aldrich, AT&T attached to ATA Amended Complaint, September 25, 1972, Docket 19746.

December 3, 1971 to Mr. Kelley Griffith, Chief of the Commission's Domestic Rates Division, responding to ATA's then informal complaint, had indicated a need for competitive justification, as follows:

"ATA's assertion that failure to accord similar treatment to the trucking industry will place that industry at a significant competitive disadvantage raises issues of fact as to which we lack sufficient information to comment."

ATA has now been explaining for the past five years the needs of regulated inter-city motor carriers for a full scale industry network and the untapped opportunities for industry operating efficiencies which such a network would make possible.

29. In its previous correspondence with AT&T, its initial Informal Complaint to the Commission, and in its early pleadings in Docket 19746, ATA showed that the inter-city trucking industry has operational savings and service improvement possibilities unrelated to communications circuit price levels which simply cannot be developed unless it achieves single customer status, and ATA already has justified its request for single customer status based upon its own needs and plans, as well as upon the obvious unreasonable discrimination which exists vis-a-vis airlines. The Commission is urged to review the long history of this matter in its own files, dating back to 1971. Additionally, ATA will briefly summarize herein its needs and proposed plans, which depend for their fulfillment

upon treatment as a single customer as to operation of a network to facilitate and improve inter-city certificated trucking service operations.

30. ATA for many years has been concerned with the development of more economical and efficient methods of routing and controlling inter-city shipments via motor common carriers, and reducing dead mileage. This depends upon better communications and data processing methods than are now available to the industry. The inter-city trucking industry must improve documentation, rating, tracing, billing and transferring as well as terminal handling speeds. The structure of AT&T tariffs, containing as they do various restrictions as to "authorized users", communications "to or from the customer", "joint use", "resale" and "hybrid communications/data usage" simply does not permit a communications network of the type needed by ATA on which to build new transportation concepts to be installed, operated and administered by a single entity, unless that entity is treated as a single customer.

31. The administrative and operational tariff inhibitions of such a network are fully as important as the cost inhibitions. For example, though the system planning and coordination, and the specifications for various facilities needed in a large integrated network must be developed at ATA's central engineering and control location, orders to the various telephone companies to effectuate such installations would now have to be handled locally, by the local trucking company, with the local serving utility. Motor carriers generally simply do not have local personnel

capable of handling the negotiation of such facility and interconnection orders. Nor is the chore one of rote, whereby cut-and-dried facility orders could be sent to local trucking companies merely for relay to serving communications common carriers. Facility and interconnection orders need to be negotiated constantly in such a system by knowledgeable personnel on both sides of the negotiations in view of the non-uniform availability of facilities and the varying responses of individual companies and even individual offices within the same company to requests for facilities to be added to or subtracted from a wide area system involving facilities of the local common carrier, sister companies, connecting companies and private systems. It is essential to the reasonably efficient and effective establishment and operation of such a system that ATA be permitted to negotiate and place orders for the various network connected facilities at one central point with one telephone company representative or office, which in turn requires treatment of ATA as a single customer.

32. In 1945 ATA organized a corporation known as Highway Radio, Inc. to create and operate a nation-wide motor carriers' communications network, and has ever since that time studied microwave and TELPAK approaches to the inter-city trucking communications network problem. It soon became apparent to ATA that the creation from scratch of a nation-wide private radio system to serve motor carriers' needs would be a perilous and difficult project of a magnitude which would require ATA to run a substantial risk that the radio system might not achieve

practicability and competitively realistic cost, administration and operational levels of efficiency for many, many years. As a result, ATA determined that it can most effectively carry out its responsibilities by the establishment of a nation-wide motor carriers' system based upon the use of circuits and equipment leased from common carriers, combined with and integrating the numerous small private mobile and point-to-point radio systems already in existence and others which may be added. The creation of such a system would be the task of ATA, but it cannot be carried out unless and until ATA is granted the same single customer status which was granted to ARINC, and for the same reasons this status was needed by ARINC.

33. ATA as such will not be the user of the proposed system, but rather the various regulated inter-city motor carrier members of ATA will be the users. Tariffs impose serious restrictions concerning administration, operations and costs on systems made up by interconnection of facilities leased to numerous individual users. With respect to such an operation, the wide variety of telephone companies who contribute their facilities to such a vast network often have different interpretations of tariff restrictions as to shared use, resale of service, and user-traffic tariff inhibitions. AT&T will not even process, control and bill the circuits from independent telephone companies for the centralized ATA network operational staff to a single ATA administrative office, sans single customer recognition. The establishment and operation of the vast type of system needed by

motor carriers, which closely parallels that of ARINC, would be difficult to the point of utter impracticability if ATA were not afforded the same type of single customer status which has been granted to ARINC.

34. It can easily be appreciated that the institution of the desired and proposed nation-wide communications and data processing systems needed by motor carriers will entail great start up and learning costs, and that at best, it may take many years before it is "competitive" to the systems of other branches of the transportation industry. If motor carriers were also required to shoulder the burden of higher basic common carrier rates than ARINC, due to refusal to grant the same single customer status to ATA, the start up burden would be so much the greater, and the prospect of achieving cost efficiency parity with other transportation industry systems would be nil. Such a situation would seriously endanger, or would destroy ATA chances of achieving an operational network which is practical and competitively realistic.

35. Other than to indicate that, given the same number of years of favorable administrative and rate treatment which has been afforded to ARINC, an ATA system for inter-city motor carrier use probably would favorably compare with the channel availability shown by ARINC on its Figure 1 to its first round Comments, it is not possible to describe in detail the probable evolution of the proposed ATA network. The potentials for operational improvements through use of well-organized

communications and data processing are such that the ATA-planned network should develop at least as rapidly as did the ARINC network. However, two fundamental matters must be satisfied to justify commencing a revolutionary development such as is contemplated by ATA in the establishment of proper communications, data processing and operational methods to bring more effective trucking industry response to bear on the nation's transportation needs:

1. Before the industry can commence to implement such a plan, it must be reasonably apparent that the objectives are attainable, given proper management of resources which will be available.
2. Specific safety, service improvement and cost savings operations must be planned and effectuated one at a time and in building block fashion.

The first condition set out above cannot be satisfied at present.

Given present use restrictions (the applicability to ATA of which both AT&T and this Commission have now been considering for some five years) ATA cannot take the first step to implement the industry plan because telecommunications common carrier channels, the resources to accomplish the objectives, are not available to ATA for management.

36. Early in 1972 the Chief of the FCC Common Carrier Bureau advised counsel for ATA that the Commission Staff would not interpose an objection to AT&T putting into effect a tariff revision that would extend to ATA the same single customer status accorded to airlines.

(See Exhibit A hereto.)

It seems completely improper to ATA that more than three years later, AT&T is still permitted to continue a specifically unreasonably discriminatory tariff treatment of ATA which effectively blocks the initiation by ATA of a program designed sharply to improve regulated inter-city motor carrier operations upon which virtually every resident of the United States depends. "If you got it, a truck brought it."

WHEREFORE, ATA renews its request that the Commission promptly issue its interim order directing AT&T to afford the same single customer treatment to ATA that it now affords to ARINC, pending completion of these proceedings. Such treatment will permit ATA to commence creation of a nationwide communications and data network for the use of certificated inter-city motor carriers. which system will be designed to "improve all aspects of the... industry's functions"^{1/} by providing to the trucking industry services which "could not practicably be provided" ^{2/} but for single customer status.

Respectfully submitted,

American Trucking Associations, Inc.

Dated: April 25, 1975

^{1/} Air Transport Association of America, Comments, p. 12.

^{2/} ARINC Comments, p. 46.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

March 17, 1972

1388
EXHIBIT "A"

IN REPLY REFER TO:

9310

Jeremiah Courtney, Esq.
2120 L Street, N. W.
Washington, D. C. 20037

Dear Mr. Courtney:

In response to your letter of March 2, 1972, the Common Carrier Bureau will not, on its own motion, interpose any objection to AT&T putting into effect a tariff revision that would extend to the motor carrier trucking industry the same "single customer" status that is now given to the airlines in AT&T tariff 260.

It should be clearly understood, however, that in taking this position the Bureau is not necessarily expressing concurrence in the various premises advanced in your letter as support for the extension of "single customer" treatment to the motor carrier industry.

Nor is the Bureau hereby indicating its approval or disapproval of the tariff revision you propose. In the event that objections are filed to such a tariff, the Bureau will consider any such objections on their merits and will make such recommendations to the Commission as we deem warranted in the circumstances.

Sincerely yours,

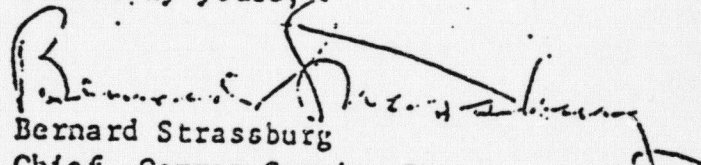

Bernard Strassburg
Chief, Common Carrier Bureau

EXHIBIT "A"

Response of
Telenet Communications Corporation

I. Preliminary Statement

1. Having presented detailed comments at each of the two prior stages of this proceeding, Telenet will limit itself in the instant filing to responding to the Comments of the Office of Telecommunications Policy and the Reply Comments of Tymshare, Inc., and to a limited portion of AT&T's Reply Comments. To the extent that other parties' second-round filings take positions which are at odds with those advanced by Telenet, they have been largely anticipated and dealt with in Telenet's earlier comments, which need not be repeated here.

II. Comments of OTP

The Office of Telecommunications Policy (hereinafter "OTP") alone urges that "communications brokerage -- including, but not limited to, shared use and value-added service -- should be freed from present common carrier tariff restrictions, and that such brokerage does not require common carrier regulation under Title II of the Communications Act." (Comments, page 3)

It is interesting to note that OTP expressly endorses the conclusions reached by the Commission in its Computer Inquiry, in its stated willingness to "assume that the 'primary business' test . . . will continue to be applied to this jurisdictional question." (Comments, page 2). Such assumption is wholly inconsistent with the principal thrust of OTP's Comments. In defining "hybrid communications services" (which were to be subjected to carrier certification and regulation) in terms of their "primary purpose" (28 FCC2d 291, at 305), the Commission obviously recognized that no such hybrid entity would construct its own transmission facilities, and that it was dealing with a form of communications resale. Yet OTP would deregulate all forms of resale, even where the exclusive business of the resale entity is communications service. OTP apparently intends that the Commission should ignore the policies developed so painstakingly in the Computer Inquiry, in its suggested deregulation of all forms of resale.

In any event, OTP's position rests upon a mis-comprehension of the purpose of federal regulation of communications common carriage, and upon legal and economic arguments which are not apposite to the communications environment. These arguments will be analyzed in detail below.

A. The Nature and Economic
Characteristics of the Resale-based
Communications Industry

In its Comments, OTP takes an overly generalized approach to the question of the appropriate regulatory status of sharing and

resale of communications facilities. OTP lumps both sharing and resale into a category which it calls "brokerage", failing to distinguish the fundamental differences either (1) between sharing and resale, or (2) between true brokerage and value-added communications service (the two distinct types of resale activity which are possible). As to bona fide sharing of communications facilities and services, Telenet agrees that it should not be regulated as a common-carrier activity. OTP did not address the question posed in the Commission's Notice of Inquiry as to the need for certain controls upon sharing in order to prevent abuses. Telenet, in its initial Comments, discussed the question, and will not repeat these arguments here.

(1) The Nature of Resale

As Telenet and many other parties to this proceeding have stated previously, the resale of communications facilities and services encompasses both pure brokerage (arbitrage) of transmission capacity and also provision of value-added communications services. Since both entail the offering to the public of communications services for hire, Title II of the Communications Act dictates that both must be regulated by the Commission.

Pure brokerage or arbitrage consists of the simultaneous purchase and sale of a commodity to profit from unequal prices in different markets.^{1/} In the communications industry context,

^{1/} In some industries, a broker may function merely as a "matchmaker", bringing buyers and sellers together and receiving a commission as compensation for his services, such as in the case of the proposed household goods brokerage service cited by OTP at p. 13 of

the broker would obtain communications service (e.g., Telpak channels) from a carrier at low bulk-rate prices and resell the same service in smaller units or increments (e.g., individual voice-grade channels) at a price lower than the supplying carrier's price for similar units of capacity. The customer's sole motivation for dealing with the broker is price, and the question of whether such activity is in the public interest is one combining issues of economics and public policy: a very complex question involving issues of price discrimination, rate structures, cross-subsidization, separations, viability of the new specialized carriers, etc., have been discussed at length by other parties to this proceeding. Without repeating its earlier arguments, Telenet wishes to emphasize that the Commission has a statutory duty to weigh these questions, when presented with specific brokerage proposals, to determine whether the public interest and necessity would be served or frustrated in a particular case. Thus, the Commission should not attempt to "deregulate" communications brokerage as a general proposition, as urged by OTP.

Value-added communications services are fundamentally different from pure brokerage, and must not be confused with it. The value-added firm operates much as a manufacturer -- taking various raw materials (in Telenet's case, communications channels,

its Comments. Activity of this sort does not involve "resale", and, to the extent, if any, that it exists in the communications industry, it is not at issue in this proceeding.

computer switching equipment, computer software, etc.) and converting them into a finished product (here, packet-switched data communications service) which bears little or no resemblance to the raw materials used to produce it. In the words of the American Trucking Associations, the services provided by Telenet and other value-added carriers "are new primary communications services which differ from any primary services previously offered by AT&T, WU or any other General Common Carrier." (ATA Reply Comments, p. 5). AT&T, too, in its Comments to this Commission, has characterized Telenet's value-added type of service offering as "innovative." (Comments, p. 13). There is general agreement among the parties to this proceeding that the provision of packet-switched data communications service by organizations such as Telenet is in the public interest, and the only issue raised by OTP's Comments relates to its proposal that such activities be deregulated by the Commission.

(2) Economic Characteristics of Resale

OTP urges that the Commission should ignore the common carrier nature of the service being provided by resale-based communications suppliers and should deregulate such firms. This position is based, in part, upon OTP's contention that there are no "natural monopoly" characteristics in either the brokerage or value-added network businesses. However valid this contention may be with respect to true brokerage activities (and as summarized above, there are sound reasons for regulation of pure brokerage, even if it has no "natural monopoly" characteristics) it is a totally

unproven proposition with regard to value-added network services, and probably cannot be determined for many years, until the market for these services matures, and their own economies can be more accurately measured. The analysis prepared by the Office of Telecommunications ("OT") of the Department of Commerce and presented to the Commission by OTP,^{2/} which is examined in the following paragraphs, clearly cannot be relied upon to resolve this issue of the "natural monopoly" characteristics of value-added services, even if one could accept the validity of OT's "industry guesses" as to the size of the potential market for completely new services having new price structures.

OT's narrow economic analysis, upon the basis of which OTP concludes that no value-added networks exhibit economies of scale, suffers from several significant defects. While OT admits that "the networks investigated here did not include the so-called distributed networks popularly identified with packet switching and ARPANET technology ("VANS cost Characteristics," p. 4), it nevertheless concludes that the cost characteristics of these distributed networks, the kind which are most appropriate for the provision of value-added communications services, are similar to those of conventional star-configuration data communications networks utilized by private companies to provide

^{2/} "VANS Cost Characteristics," prepared by the Office of Telecommunications, U.S. Department of Commerce, and submitted for the record in this proceeding under cover of letter from OTP dated March 26, 1975.

access to a central data center.

One may wonder why OT analyzed the costs of star-type networks, rather than distributed networks most likely to be used in the provision of public communication services. But regardless of OT's reasons, it would be a dangerous course for the Commission to base major public policy decisions upon economics which are conceded by their proponent to be of minimum relevance to those at issue.^{3/}

Moreover, there is affirmative evidence that OT's analysis is inapplicable to distributed networks. In essence, OT seriously underestimates the fixed capital requirements for a nationwide value-added carrier service, while grossly overestimating the marginal costs associated with such networks, yielding results which incorrectly indicate only moderate economies of scale. OT's estimate of fixed capital costs is understated because (1) system and software development costs were ignored, (2) redundant nodal equipment was not provided for (as is clearly necessary for reliability reasons in a public communications service), (3) OT's hypothetical network served only 50 cities, and experienced no geographic expansion as traffic levels

^{3/} The weakness of OT's conclusion is illustrated by the Abstract to its report, which admits that a different type of network was studied, and that "It is therefore not known whether, or to what degree these same cost characteristics [the ones derived in the study] would also apply to distributed networks of the type popularly identified with packet switching and ARPANET technology. However, there is no evidence to conclude otherwise."

increased over time, and (4) OT's network served users' computers located in only a single city, St. Louis, and only low-speed terminals located in other cities. While these assumptions may be valid in the context of a small-scale private communications network serving the branches of a single company, they are clearly inappropriate in the context of publicly-offered communications services which, under the Communications Act, should be made available as widely as possible throughout the United States.

Telenet, for one, has already invested substantial sums in the design and development of the equipment and computer programs for its network, and is utilizing extensive redundant switching equipment. In its original Section 214 application, Telenet informed the Commission of its intention to serve 62 cities by the end of its fourth year of operations -- a number comparable to the 50 cities assumed by OT. However, Telenet expects the geographical coverage of its network to continue to expand beyond that level as the market for its services develops, and it is not unreasonable to project packet network service to some 300 cities (providing local access to approximately 80% of the U.S. population) within ten years. Such geographic coverage will require capital expenditures substantially greater than those assumed by OT.

Moreover, a nationwide public data communications network such as Telenet is building must provide costly facilities for high-speed (up to 56 kilobits per second) access for customer computers located in many cities across the country, and must

also provide for access by terminals operating at speeds up to 9,600 bps. Such a public network, serving customer needs not met by the typical private time-sharing network, requires a totally different network design than that assumed by OT, with substantially greater investment per city served.

OT also greatly overstated marginal costs by assuming the use of only analog, terrestrial transmission facilities, at outdated (pre-Hi/Lo) tariff rates. For example, the marginal cost of a 1200 mile 50-kilobit terrestrial analog circuit (a major transmission component in the larger OT-designed hypothetical networks) is \$125 per kilobit of capacity per month. However, recently-introduced digital transmission services reduce this figure by more than half, and domestic satellite facilities further reduce this marginal cost to \$6.00/kilobit/month when a 1.5 megabit channel is used, or \$1.40/kilobit/month when a full transponder is leased. Obviously, the economies of full transponder leasing by a value-added carrier will only be realized when the carrier's long-haul traffic reaches a substantial threshold level.

As a consequence of relying upon a model which is not representative of the public distributed networks which are expected to comprise the major component of the value-added industry, OT's projections of the maximum achievable economies of scale are grossly erroneous. For example, OT's analysis indicates that the lowest cost per transaction for its hypothetical network, after exhausting the economies of scale, is 12.3 cents. Yet, the price for a similar transaction through

the Telenet system is just 6.6 cents, based upon the price schedule which Telenet intends to incorporate in its tariff.^{4/}

Clearly, the economies of scale of distributed networks are substantially greater than those of the private star-configuration systems analyzed by OT.

Further evidence of these extensive scale economies may be seen in a publicly-available study performed by the Network Analysis Corporation under contract to the Federal Reserve System. The purpose of the study was to determine the per-transaction communication costs for exchanging funds transfer information among major financial clearing centers across the country using a packet-switching network. NAC examined the scale economies of a nationwide distributed packet-switching system of various sizes, and concluded:

The great economies of scale resulting in the system are obvious when one notes that the same equipment can be used, with only leased communication lines and data set changes, to handle yearly transaction rates ranging from 10 million to 4 billion. Moreover, as the number of transactions increases, the cost per transaction steadily decreases. Actually, only one component of total cost increases on an absolute basis. This is the yearly cost of communication lines, and even this element of cost decreases on a per-transaction basis as the number of transactions increases. Overall, each tenfold increase in transaction rate results in nearly a tenfold decrease in cost.

^{4/} Proposed tariff rates yielding this result (total costs of approximately \$2.00 per terminal hour for service to low-speed terminals) were first publicly announced by Telenet in January 1974, and have been available to OTP since that date.

Another economy of scale that is not as visible is that resulting from expanding from a 12-site system to a 36-site system. Clearly, if we handle the same total number of transactions in the two systems, the 36-site system *must* be more expensive since we must purchase more equipment and incur larger manpower and maintenance costs. However, if we consider the cost per transaction per site, a different conclusion is reached. For example, if each site generated on the average 10 million transactions per year, the 12-site system would have a cost of about 0.8 cents per transaction, while the 36-site system would have a per-transaction cost of 0.65 cents. Therefore, when sites are added, economies of scale are achieved. (Emphasis added)^{5/}

The evidence that value-added networks do exhibit economies of scale does not mean that more than one value-added carrier cannot compete in the data communications market, or even that the cost to the public of packet service would be substantially increased by several competitors. However, it is clear that a simple study of private star-configuration networks does not permit one to determine whether a value-added network is a natural monopoly. In fact, using the technology currently planned by Telenet, there is a definite possibility of continuous unit cost reductions well beyond the current estimated market size. However, the ultimate market size and the effect of elasticity of demand have yet to be determined, and thus Telenet does not believe it is possible at this time to predict with reasonable precision the extent to which value-added networks will or will not exhibit natural monopoly tendencies in practice.

^{5/} "Packet-Switched Communication Networks for Electronic Funds Transfer Systems," prepared by Network Analysis Corporation for the Board of Governors of the Federal Reserve System, January 1973, pp. 50-51.

B. Common Carrier Regulation Is Not
Limited to "Natural Monopolies"

Even if it were established that value-added communications services will be fully competitive with no monopolistic tendencies, this would not avoid the Commission's statutory responsibilities to regulate such activities in accordance with the certification and tariff provisions of the Act. Although OTP contends that it is the purpose and intent of the Communications Act to regulate communications activities only where there is a presence of monopoly or a likely emergence of monopoly, the Act is not premised solely on monopoly conditions in the industries or activities regulated. In fact, competition rather than monopoly has been the rule, and not the exception, in the case of Federal economic regulation. Railroads, motor carriers, airlines and gas pipelines are all competitive industries with the nature and extent of competition determined and controlled in part by the exercise of the certificating and licensing authority of the commissions involved.

In the communications field, the Communications Act was legislated at a time when major segments of the industry were already operating in a competitive mode. Domestic telegraph services were furnished competitively on a nationwide basis by Western Union and Postal Telegraph, Inc., as well as by a number of smaller record carriers that operated along railroad rights-of-way. Internationally, competing overseas telegraph carriers were providing record communications services by cable and by

radio. None of these companies or activities was exempt from regulation by virtue of being competitive.

In all of the industries mentioned, controlled competition has been used as an instrument of regulation to achieve the economic and social objectives defined by the Congress for the guidance of the regulatory agency. To implement such control, Congress made it a requirement that any entity seeking entry into the particular industry must first obtain a certificate of public convenience and necessity or license which would issue only upon a finding by the agency that a grant of such certificate or license would serve the public interest and would be consistent with the objectives of the statute.

The landmark decision of the Supreme Court in the RCA case^{6/} removes any doubt that competitive entry is an integral part of the regulatory scheme with respect to communications. The Court stated at 346 U.S. 86, 93-4:

Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention.

^{6/} F.C.C. v. RCA Communications, Inc., 346 US 86, 97 L.ed. 1470 (1953).

Stressing that the Act requires a prior determination by the Commission that entry or competition will be in the public interest, the Court concluded that "[M]erely to assume that competition is bound to be of advantage in an industry so regulated and so largely closed as is this one, is not enough," but rather the Commission must at least warrant "that competition would serve some beneficial purpose such as maintaining good service and improving it."

Obviously, for the Commission to warrant that proposed competitive entry will further the objectives of the Act requires that the Commission have the opportunity to evaluate a given proposal in terms of whether its approval will serve the public interest, convenience and necessity. Congress established the certification and licensing processes of the Act as the vehicle to be used for such evaluation and approval. It was in this statutory context that the FCC established and has implemented its policy of competitive entry into the intercity specialized communications market as well as competitive entry by domestic satellite common carriers and value-added carriers. It is within this same statutory context that the Commission, as changing economic or technological circumstances dictate, may alter, modify or revoke its policies regarding competition. In both the Specialized Common Carrier proceeding and the Domestic Satellite proceeding the Commission made it expressly clear that its certificating and licensing policies would be subject to change should conditions so warrant in the future. Continuation of some regulatory oversight, even for sectors of the communications industry thought to be fully

competitive, is required in order to ensure that competition is fair, that the public is served without discrimination, and that other essential communications services are not adversely impacted to the detriment of the public interest. Surely, the Commission has the right to know what is taking place in new phases of communications development without either imposing upon them the full scope of classical utility regulation or opening the door to totally unfettered and potentially destructive competition. Adoption of a reasonable middle ground is consistent with governing law, sound discretion, and common sense.

If, as asserted by OTP, regulation "is justified solely by the presence or likely emergence of monopoly power" (Comments, p. 13), the Commission should seek authority to deregulate the international record carriers, the specialized carriers, the domestic satellite carriers, the miscellaneous microwave carriers, the radio common carriers, and perhaps even AT&T's Long Lines Department -- as well as the value-added carriers. Such authority must come from Congress, and cannot be based upon OTP's strained analogies and unsupported assumptions.

Exemplifying OTP's peculiar analysis is its argument, beginning at page 10 of its Comments, that the Commission's Decision in Mackay Radio and Telegraph Company, 6 FCC 2 (1938), stands only for the proposition that an entity already certificated as a communications common carrier may not lease from another such carrier a particular line without obtaining certification pursuant to Section 214 of the Act, and that that case does not require

the Commission to impose on non-carriers a certification procedure attending their acquisition by lease of a carrier's line for the purpose of offering communications service to the public. In other words, OTP would have the Commission determine whether a particular business activity (the leasing of a line in order to provide communications service to the public) is or is not a common carrier activity based solely upon the identity of the firm engaging in such activity. Such an approach would lead to obviously inequitable results due to unequal treatment of different firms offering like resale-based communications services, and would also frustrate other policy objectives of the Commission.

For example, such a reading of Mackay and of Section 214 of the Act would permit the unregulated entry by IBM into the domestic satellite market, through the device of leasing satellite capacity from certificated carriers. IBM would thus be permitted to provide end-to-end computer-based satellite communications service without prior certification as a regulated carrier, thereby avoiding the safeguards which the Commission has stated it deems necessary to impose upon any entry by the company into the domestic satellite market. (See, Memorandum Opinion and Order in Docket 20221, adopted Feb. 6, 1975; FCC 75-156.)

OTP's proposal, if adopted by the Commission, would also permit a non-certificated entity to lease channels from AT&T at bulk Telpak rates, and to offer an interstate private-line service totally beyond the pale of regulation. The effect of such an offering upon specialized private line carriers such as Southern Pacific, Datran, and MCI would be devastating. Although

AT&T has predicted in its comments that unlimited resale would lead to the elimination of Telpak altogether, this might not occur until after AT&T's regulated competitors were irreparably injured or destroyed.

Thus, OTP's assumption that the Commission's regulatory interest is limited to "natural monopolies" is not only legally and historically erroneous, but it carries with it implications for the Commission's on-going regulation of the industry to which OTP has seemingly given no consideration.

C. The Communications Industry and
Its Regulation, Are Not Analogous to
the Transportation Industry and
Its Regulation

OTP's position assumes that the problems presented by communications brokerage can be analogized to those of the typical form of transportation brokerage, the rail- and air-freight forwarding businesses. Because the courts historically viewed freight forwarders as "shippers", and not as "common carriers" (until Congress expressly brought forwarders into the regulatory framework), OTP contends that carrier status and other regulatory oversight should not be applied to any form of communications brokerage, and as noted above, it simplistically includes within its definition of "brokerage", value-added services such as the packet-switched data communications service offered by Telenet.

In Telenet's view, an attempt to solve the questions posed by the instant Notice of Inquiry by resorting to common law

concepts of what constitutes a common carrier, or by attempting to analogize communications to transportation, is a sterile exercise. Although certain limited superficial similarities exist, when subjected to careful scrutiny, basic differences appear.

Modern communications technology and the broad economic and societal problems which it involves have little relationship to the transportation industry -- either as it existed a century ago, when the Interstate Commerce Commission was created, or as it exists today. A determination as to whether the brokerage of communications services should be controlled, or whether value-added communications services require Commission regulation through the certification and tariff provisions of the Act, should be based upon the technology, economic characteristics, and other relevant properties of the communications industry -- not upon strained analogy. The Courts have been "unwilling to restrict the Federal Communications Commission to a course of action which has been dictated by the requirements of the transportation industry." General Telephone Co. of Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). There is no reason for the Commission to so limit itself.

OTP's apparent dissatisfaction with the manner in which the ICC and the CAB have regulated the transportation industry may or may not be merited, but there is no basis for assuming that the weaknesses of those Agencies must be attributed to the Federal Communications Commission. OTP's criticism of the ICC as "something

like the governing body of a cartel, allocating business so that survival of each mode of transportation is assured" (Comments, page 12, quoting with approval from Wood, Intermodal Transportation and the Freight Forwarder, 76 Yale Law J. 1360, 1373 (1967)), has no applicability to the Federal Communications Commission, which has expressly decreed "open entry" policies for both specialized and value-added carriers.

In the wake of the economic collapse of several major regulated transportation companies -- and with other such companies in extreme financial distress -- it has become popular to the point of fadist to suggest that these companies suffered principally from over-regulation; that, but for the heavy hand of the bureaucracy, these industries would have prospered, or would at least have survived. Even some of the "regulators" have joined the chorus. Several observations concerning this trend are in order:

- (a) The economic problems of the transportation industry flow from many factors, only some of which are related to the manner in which they have been regulated.
- (b) The Penn Central-Rock Island-Pan Am cases have no counterparts in the communications industry; there has not been a single bankruptcy among the interstate communications common carriers in the past thirty years.
- (c) Expansion of communications services and technological innovation have occurred with the assistance of the Commission, and not despite its regulation of the industry.
- (d) Those who view deregulation as a panacea for the

economic ills of regulated industries tend to overlook the actual abuses occurring in particular industries which led to their becoming regulated in the first instance.

It has been Telenet's experience -- albeit of limited duration -- that regulation need not be onerous, nor economically harmful. While some of this Commission's procedures can no doubt be improved to the advantage of the public, the regulated carriers, and in the interest of greater Commission efficiency, these improvements can be made without the massive deregulation proposed by OTP.

In short, the judgment of whether and how the Commission should regulate resale, and particularly value-added services, should be based on rational analysis of the developing communications industry, and the Commission's own experience; not on the basis of the business and/or regulatory failures of other industries and agencies.

D. Drawing the Regulatory Boundary Based
Upon Lease Vs. Ownership of Facilities is
Not a Workable Approach

There are two possible approaches which the Commission could take in determining whether a particular communications service activity should be treated as "common carriage" under the Communications Act and regulated accordingly:

(a) From a service viewpoint, the Commission could examine the nature of the communications service provided by the firm to its customers, to determine whether the purpose and functional characteristics of such service have the indicia of a communications common carrier undertaking; or

(b) From a facilities viewpoint, the Commission could base its determination upon whether the firm owns and operates its own communications facilities (e.g., microwave radio equipment and switching equipment) or whether it leases such facilities from other organization(s). It is also possible, of course, to consider both facilities and service aspects of a firm's business operations in reaching a judgment regarding the appropriateness of common carrier regulation of such firm.

Traditionally, the Commission has followed the "service" approach, and has regulated as carriers those entities which offer to the public a communications service for hire, (i.e., are "engaged as a common carrier for hire" -- Section 3(h) of the Act) regardless of whether they own or lease their transmission facilities. In contrast, OTP proposes that the Commission base its regulatory judgment exclusively upon the ownership of the transmission facilities utilized by a communications service firm, and exclude consideration of the nature of the firm's service offering. Telenet believes that such an approach places the cart before the horse, and that the question of fundamental regulatory importance is the nature of the firm's undertaking to provide service to the public, with internal corporate questions of whether facilities are owned or leased being of no particular relevance.

OTP tends to view the communications industry in simplistic black-and-white terms: it apparently believes that facilities carriers do not engage in resale of other carriers' facilities, that resale-based communications service vendors do not provide

any of their own communications facilities, and that it is therefore possible to treat the two quite differently for regulatory purposes. However, this is simply not the case. Communications firms cannot be easily labeled as black or white regarding the ownership of their facilities, but rather they fall into a wide spectrum containing many shades of grey. In view of this reality, it would be futile to attempt to establish the boundary of common carrier regulation based upon whether the firm owns its facilities or leases them from others, even if there existed legal or public policy support for such demarcation. To illustrate the practical difficulties inherent in such an approach, consider the many different lease-vs-ownership situations which exist concerning the facilities utilized by various types of carriers.

A. AT&T falls at one end of the spectrum regarding facilities ownership. It owns and operates virtually all of its own communications plant, with only a few exceptions. (For example, AT&T has previously obtained certain terrestrial transmission facilities under lease from Western Union, and it intends to lease the space segment of its domestic satellite system from Comsat General.)

B. The international record carriers have experienced somewhat of a metamorphosis regarding facilities. In the early days of the international carrier industry, each carrier owned and operated its own individual under-sea telegraph cable facilities, and/or its own radio

facilities. Then high-capacity undersea telephone cables were laid, and the IRC's began to use these cables jointly with other carriers -- in effect, leasing channels in the cable, but with certain ownership attributes.^{7/} With the advent of international satellite communications, the IRC's began to obtain satellite channels from Comsat on a pure lease basis under tariff, and such channels now constitute a major portion of the facilities utilized by the IRC's. In addition, the IRC's also lease local distribution facilities from the telephone companies, lease long-haul circuits from AT&T for transiting traffic between their gateway cities, and utilize (resell) domestic telegraph services for hinterland access. Of course, the IRCs' metamorphosis from exclusively owned to largely leased international circuit facilities, and their extensive use of leased domestic facilities, has not affected the essential characteristics of their service to the public, or their status as regulated common carriers.

C. Western Union has leased a large percentage of its long-haul and local distribution facilities from the Bell System for decades. Only within the last twenty years did it begin to build its own transcontinental microwave system, and even today this system does not extend to many localities served by Western Union. And, of course, the

^{7/} The arrangement employed is known as the indefeasible right of user (IRU).

telegraph company also makes extensive use of local distribution facilities leased from the telephone company both under tariff and under negotiated contract.

D. The domestic satellite carriers fall into several different categories regarding ownership of their communications facilities. Western Union owns and operates both its earth stations and its satellites. RCA owns and operates its own earth stations, but leases satellite transponder capacity from another carrier (Western Union). However, RCA plans to launch its own satellites in the future. American Satellite Corp. owns and operates its own earth stations, and utilizes leased satellite transponder capacity. To Telenet's knowledge, ASC has no present plans to launch its own satellite, so that it will permanently operate as a "resale carrier" rather than as a "facilities carrier" at least as to the space segment of its system. All of the domestic satellite carriers make extensive use of leased telephone company channels for terrestrial access and local distribution purposes.

E. The specialized common carriers (SCC's) originally conceived of themselves as being pure "facilities carriers": They would build and operate their own long-haul microwave systems, and would either build their own local distribution facilities (in the case of Datran) or would utilize no local distribution facilities at all (in the case of MCI, which did not originally plan to provide end-to-end service

to its customers). Economic and marketplace realities soon caused these plans to change. First, all of the specialized carriers realized that they had to have local distribution channels, and that the only feasible means of obtaining such channels was to lease them from the local telephone company in each city. Next, the specialized carriers also began to lease long-haul transmission facilities as well, as a temporary or permanent alternative to building such facilities themselves. One of the specialized carriers (Datran) has even sold and leased back certain of its physical transmission plant, in order to conserve its capital resources.^{8/}

F. The radio common carriers (RCC's) also make extensive use of leased facilities. While they generally operate their own two-way radio equipment, all of the telephone channels required to provide subscriber access to the radio base stations are leased from the telephone company.

G. The value-added carriers, as their name implies, will primarily utilize leased transmission facilities rather than building their own, but will own and operate a large

^{8/} The difficulty of raising the large amounts of capital required to build microwave facilities, and the economic attractiveness of leasing rather than building transmission capacity has not escaped OTP's attention. In a recent interview, John Eger, Acting Director of Telecommunications Policy, said, "I wonder if, in the present money market, the SCC's will wind up as sort of hybrid carriers, providing some of their own facilities but also serving as kind of value added carriers or broker-type operators." (Telecommunications Reports, Vol. 41, No. 15, April 15, 1975, p. 5.) Would OTP therefore propose deregulation of these carriers, perhaps when their use of leased facilities passes some threshold, even though their service offerings remain unchanged?

number of computer-based switching centers through which they offer services that are fundamentally different from the transmission services they lease from the carriers. In addition, value-added packet carriers such as Telenet may, in the future, seek to install and operate their own microwave transmission facilities, over certain high-traffic routes where economic considerations make this the most attractive alternative. It may also be desirable for packet-switching carriers to implement and operate "packet radio" transmission facilities for local distribution within many metropolitan areas, once this promising new technology -- already in advanced states of development -- becomes available for operational use.^{9/} It is also conceivable that packet carriers may wish to build and operate small earth stations for use with the coming generation of high-frequency domestic satellite systems.

Considering this wide spectrum of different own-versus-lease arrangements, -- and with the mix of these factors for each carrier continually changing and evolving over time -- how and where could a regulatory boundary line be drawn based upon "facilities" criteria? And for what reason should some of the above entities be regulated as common carriers while others are not? Should the decision be based upon whether the majority of

^{9/} See, e.g., Roberts, Lawrence G., "Extensions of Packet Communications Technology to a Hand-Held Personal Terminal", AFIPS Conf. Proc., Vol. 40 (Spring Joint Computer Conf., 1972), p. 295. Also, Abramson, N., "The ALOHA System -- Another Alternative for Computer Communications," AFIPS Conf. Proc., Vol. 37 (Fall Joint Computer Conf., 1970), p. 281.

a given firm's communications facilities are owned, rather than leased? And what measure should be utilized for such a determination -- dollar value of plant, number of circuit miles, etc.? Is the firm's service to the public any less of a common carrier undertaking if its ratio of owned to leased facilities is 60% or 20% rather than 100%? Or if the firm owns all of its lines and leases all of its switching equipment, or vice versa?

It may be that OTP bases its proposal for deregulation of "value-added" carriers upon the belief that such entities will not own any of their own transmission facilities, and thus will be quite different from any of the other types of carriers listed above. However, if the criterion for deregulation were established on this basis, and a "value-added" firm were subsequently to acquire and operate any communication facilities -- even on only one route or in only one city -- it would presumably be subject to regulation once again. And if such firms, once deregulated, were not permitted to acquire and operate facilities as regulated carriers, a packet-switched network would be unable to take advantage of new and cost-effective technology such as short-haul microwave and packet radio. Clearly, neither of these results is rational or in the public interest.

In the case of a communications company which owns some of its own facilities and leases (and resells) other facilities or other services, possibly OTP would have the firm be regulated as a carrier only with respect to the "owned" facilities. Aside from the fact that for compelling legal reasons the Commission

has clearly rejected such an approach (Mackay Radio and Telegraph Co., 6 FCC 562 (1938)), it is totally unworkable where the facilities in question are all utilized as part of an integrated switched network (such as operated by AT&T, Western Union, Datran, and Telenet).

It is also noteworthy that the establishment of any regulatory boundary criteria based upon a firm's use of owned versus leased facilities would artificially and unnecessarily influence -- if not actually restrict -- the various communications entities' ability to implement their public communication networks in the most cost-effective manner. All communications carriers are faced with the continual need to make technical and economic judgments regarding the satisfaction of their plant requirements. At any point in time, such decisions must be based upon analysis of the available transmission alternatives, the cost and performance of such alternatives, the carrier's traffic capacity requirements, etc. An essential element of this managerial process is the classic "make versus buy" decision, in which the carrier considers whether to construct and operate a given portion of its facilities or to lease such facilities from others. In the interests of economy and efficiency, it is essential that all carriers be free to make such judgments without being unnecessarily biased by external regulatory considerations.

Moreover, if a regulatory boundary criterion is to be established based upon the ownership versus lease of facilities by a particular entity, why should the Commission focus only

upon the long-haul transmission facilities utilized by such entity? Long-haul transmission is only one of three types of facilities necessary to provide switched communications service to the public, the other two being local distribution facilities and switching facilities. In many, if not most, public communication networks, the cost of local distribution and switching facilities substantially exceeds the cost of long-haul transmission facilities. This is true, for example, in Telenet's packet-switched network, just as it is true in the telephone network. On the basis of these factors, the international record carriers, specialized carriers, and "value-added" carriers are identical -- they all lease their local distribution facilities from the telephone company, and own and operate their own switching exchanges, because that is the most economical and practical approach in each case.

Even when one decides which facilities are to be examined for regulatory boundary analysis, it is difficult to draw a distinct line between "ownership" and "lease" of such facilities. For example, a carrier could operate certain transmission facilities without actually owning these facilities; it could obtain its complete transmission system -- including equipment, real estate, etc. -- on a lease basis, perhaps with an option to purchase. Moreover, the carrier could own or lease the facilities and contract with another organization for operation of same. And these facilities could be dedicated to one carrier's requirements or they could be utilized by several carriers through joint ownership arrangements, cost-sharing of lease expenses if the

facilities are owned by a third party, or lease of capacity from one carrier to another and "resale" by the second carrier. Selection among these alternatives is an internal business decision which must be left to the carrier. Such a solution has little if any effect upon the user, and the Commission has relatively little interest in the matter, except with respect to ensuring fair dealings among the parties and preventing cross-subsidization.

E. The Adverse International
Implications of OTP's Proposal

In Telenet's February 24 Reply Comments, it pointed out (pages 13-16) that public packet-switched networks are being implemented in several foreign countries by the carriers or telecommunications administrations which provide common-carrier service in such countries, and noted the desirability of interconnection of these networks with the packet networks in the United States.^{10/} That discussion assumed that the U.S. packet networks would be operated on a regulated common carrier basis, a necessary status in view of the fact that the foreign PTT's have historically been unwilling to deal directly with private "user" organizations in the U.S. The OTP proposal for deregulation of value-added carriers, if implemented by the Commission, would effectively thwart the direct interconnection of U.S. and foreign packet networks, and thereby deprive international data communications users of obvious economies and efficiencies. Moreover, the large computer capacity, sophisticated software, and know-how

^{10/} In an effort to facilitate the international interconnection of domestic public packet networks, the CCITT has formed a study group to establish standards for packet networks.

resident in the United States would be deprived of a most efficient means -- use of international packet-switching networks -- of serving a growing international market.

1419

III. Reply Comments of Tymshare, Inc.

The Commission, in its Notice of Inquiry, noted that Tymshare, Inc. provides a data communications service "much the same as that proposed by PCI and others," (Notice, para. 9) and that such "proposals for computer switched data communication networks which we have received do require Section 214 operating authority and are generally subject to regulation under the Communications Act." (Notice, para. 27) The Commission further stated in Footnote 21a that "Pending the resolution of this proceeding, we will, of course, require 214 applications of entities which propose services comparable to Packet, Graphnet, and Telenet . . ."

Telenet, in its initial Comments in this proceeding submitted for the record additional publicly-available information regarding the Tymnet switched data communications service (the only such service, to Telenet's knowledge, presently being actively and openly marketed to the general public) as further support for the view suggested by the Notice that the communications service offered by Tymshare is almost indistinguishable from other common carrier services authorized and regulated by the Commission. Telenet further noted that the mere fact that Tymshare is itself a large user of the communication service which it provides is not a reason for exempting it from common carrier

regulation, but rather that this fact suggests even more strongly that Tymnet's data communications service should be provided under the rules and regulations which apply to companies engaged in common carriage, in order to protect against the possibility of discrimination and preferential treatment. 1420

Tymshare, in its Reply Comments, does not in any way dispute, modify, or disagree with Telenet's description of the Tymnet data communications service, pricing structure, and marketing efforts, or otherwise provide the Commission with a full and complete description of its publicly-offered data communication service, despite the fact that Tymshare's communications service was specifically referenced by the Commission in its Notice of Inquiry.^{11/}

Moreover, Tymshare agrees with Telenet that firms providing value-added data communications services should be regulated as common carriers, and that such regulation should be limited in nature. (Reply Comments, para. 3) However, Tymshare attempts to distinguish its Tymnet data communications service from that offered by a value-added carrier such as Telenet, arguing that

^{11/} Perhaps as a diversionary tactic, Tymshare attempts to show that Telenet's position with respect to sharing is inconsistent with that taken by two of Telenet's officers in their book, Computers and Telecommunications: Issues in Public Policy (Prentice-Hall, 1970). Although Telenet is confident that the views espoused by Messrs. Mathison and Walker in their book are not inconsistent in any significant respect with those presented by Telenet in the instant proceeding, a detailed refutation of Tymshare's argument would not be expected to be of any particular assistance to the Commission in resolving the public interest issues before it today, particularly in view of the substantial developments in both technology and Commission policy since the book in question was written more than six years ago.

because Tymshare has a communications need of its own, it is not solely in the business of providing communications services for others. Tymshare states that this fact "enables Tymshare to share and provide joint use of its network in a manner acceptable to AT&T". (Reply Comments, para. 8; emphasis added) Thus, Tymshare concludes that it "is not a common carrier as defined in the Communications Act." (id.)

The fallacious nature of this argument may be seen in two ways. First, it should be obvious that alleged compliance with AT&T's joint use tariff provisions is not the proper test of whether a communications service offering constitutes a common carrier undertaking. Although AT&T has a responsibility to enforce its tariff provisions, it has been much less than consistent in playing the role of "policeman" for the Commission in this regard.^{12/}

^{12/} For example, on October 25, 1974, AT&T told the Commission: "Transmission and switching of messages constitute, without question, a communications function. Likewise, when a "hybrid data processor" uses AT&T's services to perform these functions, without any processing and for compensation, such use is the clearest example of both the resale of AT&T services and the use of AT&T's services for the collection and transmission of messages in which the "hybrid data processor" has no direct interest, in direct violation of AT&T tariffs.*

* AT&T Tariff C.C.C. No. 259, para. 2.2.1; AT&T Tariff F.C.C. No. 260, paras. 2.2.1, 2.2.3."

("Reply" of AT&T re its Transmittal No. 12171 of October 11, 1974, amending Tariffs 259 and 260 to provide for composite data service vendor (value-added carrier) service, at pp. 8-9.)

However, two days previous to that, AT&T was quoted as advising Tymshare in a letter that "It is our opinion that the fee charged by Tymshare to joint users for data message switching is outside the scope of our tariff responsibility."

("Tymnet: Packet-Switched Net in Disguise?", Computerworld, October 23, 1974, p. 21; reprinted as Attachment G to Telenet's initial Comments in this proceeding.)

In any event, the Commission -- not AT&T -- is responsible for interpreting and enforcing the Communications Act.

Secondly, if Tymshare's distinctions were valid, Telenet could, merely by introducing a time-sharing computer service which would make use of Telenet's packet-switching communications network, create "a communications requirement of its own" for the packet network and thereby cease to be considered a common carrier. Clearly, however, Telenet's introduction of a new data processing service wholly separate and apart from -- but perhaps utilizing -- its communications service, would not in any way alter the nature of the communications service or make it any less of a common carrier undertaking.

Certainly, if Telenet were engaged in a totally separate business such as selling refrigerators, such activity would not in any way diminish the common carrier nature of a public communications service which Telenet might offer. And where a carrier's non-regulated business activity is one which utilizes its communication service offering, surely an even greater policy reason for treating the communications service offering as common carriage exists, due to the opportunity for preferential treatment.

The anomaly of two nation-wide computer switched data communications networks, one operating as a regulated common carrier and the other in an unregulated mode has, up to this point, been essentially an administrative curiosity. However, within the next month or so, Telenet will file its tariff and commence commercial operation. At that point, Tymshare's activities

will be of more than mere academic interest to both Telenet and the Commission.

- Will Tymshare cut its communications charges to customers who might be interested in subscribing to Telenet's service?
- Will it charge its data processing customers more, to cover its lost communications revenues?
- Will it reduce its quality of service to some customers to defray the cost of meeting Telenet's rates?
- Will Tymshare expand to new cities to match Telenet's growth?
- Are these questions of concern to the Commission?

While Telenet does not know the answers to the first four questions, it believes that the answer to the final question must be in the affirmative.

IV. AT&T Reply Comments

Telenet's concern with AT&T's Reply Comments relates to AT&T's attempt to avoid the application of any policies developed in this proceeding to the resale and joint use provisions of its DDS tariff (FCC No. 267) on the ground that such tariff provisions "are at issue in Docket No. 20288 and will not be discussed herein," AT&T Reply Comments, pp. 10-11. AT&T asserts:

The use of service provisions of any particular service cannot be examined without also considering the technical capabilities, potential markets, user needs, rate structures, and rate levels of that service. DATAPHONE Digital Service was designed with adequate consideration of the interaction of all those factors

In its Notice of Inquiry in the instant proceeding, the Commission made clear the breadth of its inquiry, with particular reference to DDS:

17. Our inquiry of course goes beyond an examination of the presently effective tariffs . . .

18. While we have discussed the resale issue in terms of private line services, we want to make clear that our inquiry includes consideration of what our policy should be in regard to resale of all common carrier services . . . AT&T has recently filed a new tariff for a service to be known as Dataphone Digital Service . . . [which] does provide for utilization of the DDS network in the provision of service to the public by other common carriers under certain conditions . . . (Footnote omitted)

It is thus clear that the Commission intended in the instant proceeding to establish policies governing the sharing and resale of all communications services -- including DDS.

In its December 11, 1974, Memorandum Opinion and Order designating for hearing in Docket No. 20288 a number of issues pertaining to DDS, the Commission expressed concern "that the sharing and resale provisions filed in the subject tariff may be discriminatory." In Bell Exhibit No. 19, submitted January 6, 1975, in Docket No. 20288, Wayne A. Robins, Long Lines' Marketing Director-Data, describes those provisions as follows:

The terms and conditions for resale and shared use can be generally summarized as follows: DATA-

PHONE Digital Service as provided under Tariff F.C.C. No. 267 may be resold only by Composite Data Service Vendors as defined in paragraph 2.1 thereof. Sharing, on the other hand, is permitted without limitation so long as the customer, as defined in the tariff, has a communications requirement of his own and so long as the service is not used for any unlawful purpose.

AT&T's case for the reasonableness of these provisions is stated in just four sentences:

We believe the provisions summarized above will accommodate all presently known user needs for resale or shared use of DATAPHONE Digital Service. We know of no specific need, nor of any valid purpose, that could be served by more liberal resale provisions under Tariff F.C.C. No. 267.

It may well be that experience in providing DATAPHONE Digital Service will demonstrate a legitimate need for some further revision in the regulations concerning the resale and shared use. In that event, AT&T will be receptive to consideration of such changes as may be indicated. (Ibid.)

It thus appears that in fact, AT&T's DDS sharing and resale provisions reflect only its views of "user need" and "valid purpose" -- with no apparent consideration to "technical capabilities, potential markets, rate structures, and rate levels" which it urges in its Reply Comments to be essential factors to be considered. "User need" will, of course, be influenced in large part by considerations of technical capabilities, rate structures, and rate levels. But "valid purpose" is independent of each of these factors, and is really at the hear of the instant Inquiry.

In Telenet's initial Comments, and in its Reply Comments,

it recognized that "sharing" served certain valid purposes, but had the potential for being extended to improper forms of unregulated resale. This is as true of DDS sharing as it is of private line sharing, and in neither this proceeding nor Docket No. 20299 has AT&T sought to explain why different policies should result.

V. Conclusion

The instant Inquiry has the potential for establishing and, in some respects reaffirming, significant policies governing the regulation of carriers and their relationship with their customers, on the important subjects of sharing and resale.

Based on the Comments and Reply Comments heretofore filed, there appears to be general concurrence in the desirability of some form of sharing, but a recognition that unrestricted and overly-permissive sharing can evolve (in fact has evolved in several specific cases, such as Tymshare) into unlawful resale. There is also general agreement that the resale of communications services is a carrier undertaking, requiring prior Commission certification (even Tymshare agrees on this point).

Although most commenting carriers perceive the "single customer" question as a form of resale, the list of potential "single customer" entities has taken on epic proportions: Rational resolution of the general resale question without consistent treatment of the "single customer" issue would obviously be futile, and would perpetuate and exacerbate the discrimination which already is present.

As noted above, OTP is singular in its suggestion that sharing and resale of all types be totally unregulated. Telenet has demonstrated that OTP's analysis is faulty in virtually every significant respect, and that the adoption of its proposal would undermine decades of thoughtful regulation by this Commission.

The question of the precise manner of regulation of the value-added carriers has not been addressed by many of the commenting parties, possibly due to an understandable lack of information concerning the nature of the value-added business or of the likelihood of particular problem areas arising. Telenet has suggested a simplified approach to certification, once a value-added carrier's initial certificate has been granted, and has recommended that the Commission defer the question of rate regulation until it has empirical data concerning the nature of the markets served and the extent and effectiveness of competition in this new field.

Respectfully submitted,

TELENET COMMUNICATIONS CORPORATION

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April 25, 1975

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Regulatory Policies Concerning	)	Docket No. 20097
Resale and Shared Use of Common	)	
Services and Facilities	)	

ERRATA

Telenet Communications Corporation respectfully requests permission to amend its "Response of Telenet Communications Corporation", filed April 25, 1975, in the above-captioned proceeding, to correct the following typographical errors:

- Page 9 -- In the third line from the bottom of the page,
 after "transaction" insert reference to footnote 3a.
 At the bottom of the page, insert footnote 3a:
 "3a/ OT defines 'transaction' as two minutes of
 connect time for a low-speed terminal."
- Page 20 -- In the seventh line, delete the comma after "public"
 and insert "and".
- Page 22 -- In the fifth line from the bottom of the page,
 underscore "international record carriers".
- Page 24 -- In the eleventh line, change "oerates" to "operates".
 In the seventh line from the bottom of the page,
 underscore "specialized common carriers".

- Page 25 -- In the third line from the bottom of the page,
underscore "value-added carriers".
- Page 30 -- In the fourth line, change "solution" to "selection".
- Page 37 -- In the next-to-last line, change "hear" to "heart".

Respectfully submitted,

TELENET COMMUNICATIONS CORPORATION

May 1, 1975

REPLY COMMENTS OF THE
UNITED STATES
DEPARTMENT OF JUSTICE

This Commission's inquiry into the appropriate classification for regulatory and tariff purposes of the brokerage of interstate communications common carrier services raises important communications policy issues. As the Commission has recognized, the development of computer technology and the increasing interrelationship between computers and communications provides this nation with an unprecedented opportunity to increase the effective utilization of communications resources. Since the filing of the various parties in this proceeding have discussed a number of issues relating to the interaction of competition and communications regulatory policy, the Department of Justice believes that a brief statement of its views on the basic issues raised herein may be of assistance to the Commission.

Many of the issues raised in this proceeding have been the subject of prior Department of Justice filings before the Commission. Moreover, the Office of Telecommunications Policy has filed Comments in this proceeding which carefully analyze the legal, economic and other policy considerations relevant to the Commission's present deliberations. Since we find ourselves in basic agreement with the positions taken by the Office of Telecommunications Policy, we see no need to burden the Commission with a lengthy repetition of that analysis and shall confine ourselves to a brief statement of our views on what we consider to be the principal issues involved.

A. Providers of Communications Brokerage
Services Should Not be Subjected to
Full Common Carrier Regulation.

In previous filings before this Commission, the Department of Justice has taken the position that the Commission should not impose full common carrier regulation, with its concomitant benefits and obligations, upon modes of communications services that do not possess the economic

characteristics which justify the need for complete common carrier regulation. 1/

The principal justification for common carrier regulation is the existence of monopoly power resulting from either significant economies of scale or the existence of an exclusive public franchise. Common carrier regulation is thus utilized as a means of preventing the abuse of monopoly power. We find it difficult to conceive of any manner in which the brokerage of communications services could expose the public to the potential abuses of monopoly pricing which warrant common carrier regulation.

The capital investment needed to enter into the brokerage field would not appear to be so large as to severely limit the number of firms which would be capable of establishing brokerage, shared user, or value added systems. Thus, the threat of new entry should, in itself, be sufficient to protect the public from monopoly pricing

1/ See, e.g., Response of the United States Department of Justice, In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Service Facilities, FCC Docket No. 16979, March 5, 1968, pp. 64-71, 90-91; and Response of the United States Department of Justice, In the Matter of . . . Specialized Common Carrier Services. . . , FCC Docket No. 18920, October 10, 1970, pp. 20-21.

of brokered communications services. Even more relevant, as a practical matter, is the fact that parties providing such brokerage services will face strong competition from the telephone companies, domestic satellite companies, and the specialized common carriers. In view of these circumstances, we suggest that there is no economic policy reason for subjecting the providers of communications brokerage services to full common carrier regulation.

Our conclusion that the brokerage of communications services should not be subjected to full common carrier regulation does not rest solely upon the absence of a need for such regulation. Indeed, we believe that the imposition of such regulation would be adverse to the public interest. While regulation can attempt to protect the public against the abuses of monopoly pricing, it can not mandate innovation and risk taking. The Commission is well aware of the time-consuming nature of regulatory proceedings and the degree to which such delay can hold back innovation. Technology in the field of computer communications is in a highly dynamic state. The imposition of full common carrier regulation upon parties who desire to provide services of a rapidly changing character can deprive the public of the benefits of

innovation that could be expected in a competitive market setting. Where common carrier regulation is necessary to protect the public, the adverse effects of regulation upon innovation is a price that may have to be paid for such protection. However, where protection against monopoly pricing is not necessary, there is no justification for incurring the loss of innovation incentives which may result from regulation. 2/

B. The Authorization of Brokerage Communications Services on an Open Entry Basis Would Promote Competition to the Benefit of the Public.

In recent years, the courts have repeatedly recognized that competition can promote the public interest even in industries subject to varying degrees of regulation and that

2/ It is conceivable that at some future time the Commission might wish to impose upon value added carriers or line brokerage firms the "common carrier" obligation to serve all comers. This is in fact quite separate from the issue of rate and entry regulation (as illustrated by the fact that much of the historic development of law of this "common carrier" variety originated with innkeepers and ferrymen who were not subject to rate and entry regulation by government). Normally such an obligation would only be imposed where competitive alternatives for service were unavailable, and this seems unlikely in the brokerage and value added fields. Antitrust law itself will impose upon the holder of a monopoly position the obligation to serve all comers, Eastman Kodak Co. v. Southern Photo M. Co., 273 U.S. 359 (1927), as it will upon those who control an essential facility, United States v. Terminal R.R. Ass'n., 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1940); Gameco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484, cert. den., 344 U.S. 817. The main point is that the obligation to serve in special circumstances can be separated--and should be separated--from the obligation to serve.

regulatory agencies must consider the promotion of competition as an important component in their statutory public interest considerations. See, e.g., Gulf States Utility Co. v. FPC, 411 U.S. 747 (1973); FMC v. Svenska Amerika Linien, 390 U.S. 238 (1968); and United States v. RCA, 358 U.S. 334 (1959).

This Commission has repeatedly recognized the value of promoting competition in communications services. It has established policies of promoting competitive entry in a number of communications services in recognition that competition provides a means of stimulating rapid technological innovation. The Commission has also recognized that competition can spur common carrier response to user demand for service innovation and provide incentives to control costs in order to maintain attractive user rates. See, e.g., In the Matter of Allocation of Microwave Frequencies Above 890 Mcs, Docket No. 11866, 27 FCC 359 (1959), 29 FCC 825 (1960); Computer Services Inquiry, Docket No. 16979, 28 FCC 2d 291 (1970), Specialized Common Carrier Decision, Docket No. 18920, 29 FCC 2d 870 (1971); Domestic Satellite Decision, Docket No. 16495, 24 RR 2d 1942 (1972); and Land Mobile Radio Decision, Docket No. 18262, 33 RR 2d 457 (1975).

The Department of Justice is well aware that the promotion of competition is not the only public policy consideration which the Commission must take into account in making public interest determinations under Title 2 of the Communications Act. The decisions of the courts in FCC v. RCA Communications, Inc., 346 U.S. 86, 92-94 (1953), and Hawaiian Telephone Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974) indicate that the Commission may not ignore other regulatory considerations solely in reliance upon the theoretical benefits of competition, unrelated to the facts of the case before it. However, these decisions only require that the Commission show a reasonable basis for concluding that the promotion of competition has the potential to provide significant consumer benefits in the case or proceeding before it.

The authorization of communications services on a brokerage basis would certainly meet the test applied by the courts in the RCA and Hawaiian Telephone cases. As indicated at pages 20-29 of the Comments filed by the Office of Telecommunications Policy in this proceeding, a number of significant consumer benefits reasonably can be expected to flow from the authorization of communications services on

a brokerage basis by firms not subjected to full common carrier regulations. The facilitation of cost-related pricing and fuller and more efficient utilization of communications resources would have clear and direct benefits to the public. Similarly, the creation of greater incentives to develop improved management and marketing techniques and to explore the development of technology can reasonably be assumed to inure to the consumers' benefit. The fact that the brokerage of communications services would be expected to allow smaller customers to achieve some of the economies of purchasing scale available to their larger competitors and thus improve their competitive posture would also seem to be consistent with the public interest in providing an efficient communications system to all users.

CONCLUSION

In summation, the Department of Justice submits that there is no justification for imposing full common carrier regulation upon firms desiring to provide brokered communications services on facilities leased from common carriers. We believe that allowing firms to provide communications

services on a brokered basis will promote competition and reasonably can be expected to provide significant consumer benefits. In view thereof, the Department of Justice supports the conclusion reached by the Office of Telecommunications Policy--that communications brokerage should be freely open to competitive entry and that such service should not be subjected to full common carrier regulation.

Respectfully submitted,
/ / / /

THOMAS E. KAUPER
Assistant Attorney
General

May 2, 1975

PETITION FOR RECONSIDERATION
OF UNITED SYSTEM SERVICE, INC., ON
BEHALF OF MEMBER COMPANIES OF THE UNITED TELEPHONE SYSTEM

United System Service, Inc. (hereinafter "United") on behalf of the member companies of the United Telephone System herein petitions the Commission, pursuant to Section 1.429 of the Commission's Rules (47 CFR § 1.429) to reconsider its Report and Order released July 16, 1976, in the captioned case to the extent that it does not consider unlimited sharing as a common carrier undertaking.

United, in support of its Petition for Reconsideration, states as follows:

I. The Commission has erred in holding that unlimited sharing is not a common carrier activity.

1. In its Report and Order in Docket 20097, the Commission has prescribed unlimited sharing and resale of various interstate private line services as being just and reasonable. Thus, entities who engage in unlimited resale of private line services (that is to say, provide interstate

private line services to others at charges which result in a profit) will be regulated by the Commission as common carriers; i.e., "...any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy...." 47 U.S.C. § 153 (h). However, those entities who provide interstate communications services to others and provide such services at charges, but without profit, i.e., unlimited sharers, will not be subject to Commission regulation. In determining whether common carrier status would attach to unlimited sharers or resellers, the Commission's touchstone was whether or not a profit was involved. United submits that the presence or absence of profit is not the test of common carrier status and that the Commission's criterion is legally incorrect and is contrary both to the Communications Act and existing case law. Section 153 (h) of the Communications Act does not speak in terms of whether or not profit is involved in the determination of common carrier status--it says, instead, "for hire." "For hire" means you charge for the service instead of doing it gratuitously or for free. Moreover, as recently held by the United States Court of Appeals for the D.C. Circuit in NARUC v FCC, 525 F2d 630, 644 (1976), common carrier status attaches by virtue of the functions which an entity performs and is not dependent upon the Commission's conference of such status depending upon the regulatory goals it seeks to achieve. Therein the Court held the critical factor in determining

common carrier status was the "quasi-public character of the activity involved." Thus, the Court specifically excluded profit as being the touchstone for common carrier status and said:

To create this quasi-public character, it is not enough that a carrier offer his services for a profit, since this would bring within the definition private contract carriers which the courts have emphatically excluded from it. What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently...." 525 F2d 630 at 641 (Emphasis added.)

2. Subsequently in NARUC v FCC, the Court had occasion to affirm its earlier holding that "...the primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking 'to carry for all people indifferently....'" 527 F2d 601, 608 (D.C. Cir. 1976). Continuing, the Court held that the second prerequisite to common carrier status is "...that the system be such that customers 'transmit intelligence of their own design and choosing.'" Id. at 609.

3. The activities of unlimited sharers and resellers, as envisioned by the Commission, are both the same absent profit. (Report and Order pgs. 6, 14-20, 51-56, and 75-81.) However, applying the above criteria, i.e., an undertaking to carry for all people indifferently and customer transmission of their own design and choosing together with the Act's own requirement that such be "for hire", it is apparent that both unlimited sharers and resellers are common carriers. Consequently, the Commission's decision to regulate resellers as common carriers because they will make a profit, but not unlimited sharers because they will not, is legally incorrect.

II. The Commission's decision to allow unlimited sharing creates a potential discrimination among unlimited sharers over which the Commission will have no control.

4. One other matter involving the prescription of unlimited sharing should be brought to the Commission's attention and this is that by creating the fiction that unless a profit is involved no common carrier status attaches to unlimited sharers, the Commission has, in effect, authorized the very discrimination which it has held common carriers may not engage in. For example, suppose in a small community there are fifty businesses and one of those businesses, Joe's Small and Tall Shoes, orders interstate private line service between Oshkosh, Nebraska and New York and offers to share it with the forty-eight other businesses in town, but refuses to do so with the forty-ninth, Sam's Shoe Shak. Under the Commission's decision, Sam would have no recourse against Joe if Joe refused to let him share the private line service; his only alternative being either to take interstate MTS, take private line service on his own, or hope to find a reseller in Oshkosh. Thus, there is nothing in the Commission's decision which prevents discrimination among unlimited sharers and the Commission has, by engaging in the fiction regarding unlimited sharers, relinquished any power it had with regard to determining whether Joe's refusal to let Sam share was a justifiable one.

WHEREFORE, in light of the foregoing, United submits that if the Commission wishes to require unlimited sharing, as it is currently defined and

structured, of private line services that unlimited sharers must be treated as common carriers under the Act as they are no different from resellers. The presence or absence of profit, as United has shown, does not determine that one group--resellers--are common carriers while unlimited sharers are not.

Respectfully submitted,

UNITED SYSTEM SERVICE, INC.
on behalf of member companies
of the United Telephone System

August 16, 1976

OPPOSITION TO MOTION FOR STAY

The American Trucking Associations, Inc. ("ATA"), by its attorneys, hereby opposes the Motion For Stay filed herein by American Telephone and Telegraph Company ("AT&T") requesting that the Commission stay the effectiveness of its Report and Order ("Order") on the above-captioned proceeding, released July 16, 1976 (FCC 76-641), as amended by the Commission's Order released August 4, 1976 (FCC 76-746) pending reconsideration of the Order.^{*/} In support of this opposition, the following is shown:

ATA And Its Interest Herein

1. ATA is a party to this proceeding and an active participant therein. In fact, ATA's complaint which alleged denial to

^{*/} Petitions, requests, applications and motions for stay have been filed by other carriers, e.g., Western Union International, ITT World Communications, Inc., GTE Service Corporation, Southern Pacific Communications Company, TRT Telecommunications Corporation, RCA Global Communications and the Computer and Business Equipment Manufacturers Association. These pleadings raise issues similar to those raised in AT&T's motion. Since ATA has been aggrieved primarily by the discrimination resulting from AT&T's single customer tariff restriction which gives access to bulk private line rate discounts to the airlines, while denying those discounts to the trucking industry, this opposition is directed to AT&T's motion and, by implication, to the pleadings of the other carriers who have requested relief similar to that requested by AT&T.

- 2 -

the trucking industry of single customer status and the resulting inability to take advantage of the Telpak discount rates prompted the investigation initiated in Docket 19746 which was merged into this proceeding with the issuance of the Notice of Inquiry and Proposed Rule Making ("Notice") herein. 47 FCC 2d 644 (1974) ^{*/}

2. The Order herein was adopted following three rounds of pleadings in response to the issues set forth in the Commission's Notice. Thirty-nine parties submitted initial comments, 36 parties submitted reply comments and 23 parties submitted response comments. These pleadings were served on all parties which filed notices of intention to participate. (Order, ¶ 1) ATA participated in all three phases of the proceeding.

3. Based on this record, the Commission issued its Order consisting of 82 pages with five appendices totaling 30 pages. In that Order, after a detailed discussion of the record and the legal issues involved, the Commission found and concluded that

- (a) "Telpak has been offered on an indiscriminate basis to any customer (as AT&T defines that term) wishing to obtain the bulk discount, except customers which desire to resell or share the service. We find this discrimination to be unjust and unreasonable, and thus unlawful." (Order, ¶ 6)

^{*/} See Order, App. E, ¶ 3.

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- (b) "According to the policy set forth herein, we also find no justification for limitations on Telpak sharing." (Ibid.)
- (c) "AT&T has from the beginning allowed certain similar users to aggregate their needs to share the benefits of the lower Telpak rates, while denying others the same advantage for reasons not justified in this record." (Ibid.)
- (d) "We find...unlimited resale and sharing of private line services...to be just and reasonable." (Ibid.)
- (e) "The tariff provisions which deny service to resellers and sharers (of private line services) are...inconsistent with the principles set forth in ICC v. Delaware, L & W RR Co., 220 U.S. 235 (1911)...and we find them to be unlawfully discriminatory under § 202(a) of the Act." (Order, ¶ 41)
- (f) "...the single customer provisions are unlawfully discriminatory and thus in violation of § 202(a) of the Act." (Order, Appendix E, ¶ 16)
- (g) "...unlimited resale and sharing of all services other than monopoly services is just and reasonable, and that tariff provisions which prevent or restrict such practices are unjust and unreasonable, and thus

- 4 -

unlawful. Unlimited resale and sharing of private line services are prescribed as just and reasonable."
(Order, ¶ 130)

The foregoing conclusions include the required statutory findings in support of a prescription pursuant to § 205(a) of the Communications Act. Cf., AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971)

AT&T Has Failed To Establish Justification For A Stay

4. In order to succeed, AT&T must meet all four of the criteria for securing a stay enumerated in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). It has failed with respect to three of the four criteria and it is questionable whether its claim that it would be irreparably injured if the stay is not granted is valid since it is not supported by any factual data, reasonable projections or affidavits.

5. AT&T's contention that granting a stay will not harm the other parties interested in this proceeding is without merit and contrary to the record herein, at least with respect to ATA. ATA, in its complaint which prompted the investigation in Docket 19746 and in its comments in this proceeding, established beyond any doubt the continuing injury the trucking industry is suffering by the discriminatory single customer tariff which makes available the Telpak discounts to the airlines, through ARINC, while denying them to the trucking industry competitors of the airlines. This harm will

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continue unless the unlawful discrimination found to exist is promptly eliminated as provided for in the Commission's Order.^{*/} The Commission's conclusion as to the unlawfulness of the single customer provision should not come as a surprise to AT&T. It has long been on notice that this provision was not only being challenged but that it was tainted by a judicially expressed doubt as to its legality. National Association of Motor Bus Owners v. FCC, 460 F.2d 561 (2nd Cir. 1972) where the Court observed that "NAMBO and ATA may well be correct in alleging unlawful discrimination under [the] conditions" where "AT&T Tariff F.C.C. No. 260, ¶ 2.2.1 provides that air carriers may be treated as a single customer."^{**/}

6. Similarly without merit is AT&T's argument that a stay will serve the public interest. In fact, the opposite is true. The Commission, after a full proceeding in which AT&T and other parties had three separate opportunities to present their views on the issues contained in the Commission's Notice, declared that the broad

^{*/} It is noteworthy that ARINC and Air Transport Association of America in their Motion For Partial Stay seek preservation of the airline industry's privileged single customer status.

^{**/} AT&T's argument that other parties will not be harmed is, moreover, contradictory. It states (p. 6) that "it is extremely unlikely that new resellers or sharers would come into existence" during the time the Commission is further considering this matter and that, therefore, a stay will not harm other parties. But if it is "extremely unlikely that new resellers or sharers would come into existence", no stay is necessary.

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restrictions on resale and sharing of private line services are unjust and unreasonable and unlawfully discriminatory (Order, ¶¶ 41 and 43); that the single customer provisions are unlawfully discriminatory and unlawful (Order, ¶ 47); and prescribed unlimited resale and sharing of private line services as just and reasonable.

Plainly, the public interest requires prompt implementation of this declaration, based on a record compiled in a public proceeding, of unlawfulness of the single customer provisions and the restrictions on sharing and resale of private line services. Continuation of these unlawful tariff provisions would permit the competitors of the trucking industry further to benefit from unlawfully discriminatory rates for Telpak services. In a similar situation a few years ago, following the Commission's decision that the limited Telpak sharing then in existence was unlawfully discriminatory, the Commission, in denying ATA's petition for stay of that order, held

"Moreover, we believe that the public would be injured by any stay of our action for the reasons, stated above, that other users, such as the press and retail merchants would bear the burden of substantially higher rates while petitioners would be benefiting from unlawfully discriminatory rate discounts for the same service." (Memorandum Opinion and Order, Docket 17457, FCC 71-1208, December 3, 1971)

The same reasons apply herein. The beneficiaries of unlawfully discriminatory rate discounts in this case are those who are entitled to single customer status declared by the Commission to be unlawful.

7. The major portion of AT&T's motion is devoted to

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demonstrating that it is likely to prevail on the merits of reconsideration or appeal. For the reasons more fully set out below, we disagree.

8. AT&T contends that a stay is appropriate because "substantial and complex questions surround the Order" (p. 8), citing the Commission's Memorandum Opinion and Order in the Western Union's SICOM Service case (FCC 76-604, June 29, 1976) where a stay was granted. But the SICOM stay constitutes no precedent for the AT&T request herein. The cases are totally different. The SICOM order directing Western Union to delete the offering found to be unlawful was issued pursuant to a complaint and responsive pleadings. Here a public proceeding was held on a record compiled on the issues involved. Then the Commission issued a comprehensive and carefully reasoned decision in which all the substantive and complex questions were fully analyzed. The SICOM stay is inapposite, therefore. What is apposite is the above-mentioned denial by the Commission of a stay of its shared Telpak decision issued, as here, after a full public proceeding.

9. The main thrust of AT&T's argument, however, relates to its contention that "the Commission does not have the statutory authority to prescribe carrier practices or rates in the absence of evidentiary hearing." (p. 8) The emphasis in this statement and throughout AT&T's argument is on the word "evidentiary." By

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"evidentiary", AT&T means a trial-type hearing. But the weight of judicial authority does not support AT&T's position. The Commission in Appendix D of its Order entitled "Necessity Of Evidentiary Hearing" included a comprehensive discussion and analysis of precedents on this very question; and concluded that the procedure employed herein fully satisfied the applicable Communications Act hearing requirements and that "trial-type" proceedings were not required.

10. AT&T, in attacking the procedure herein, relies heavily on the decisions of the U.S. Court of Appeals for the 2nd Circuit in AT&T v. FCC, 449 F.2d 439 (1971), and National Association of Motor Bus Owners v. FCC, 460 F.2d 561 (1972). It is true that in the NAMBO case the Court referred to "the necessity of holding evidentiary hearings and making findings pursuant to § 205(a) before a final order could be entered." 460 F.2d at 564 But this statement, as pointed out in Appendix D of the Order, was based on an implication of an evidentiary hearing requirement in the Commission's Telpak Sharing decision. The Commission now claims that it had unnecessarily so implied. But in any event, the Court's reference in the NAMBO case to "evidentiary hearings" under § 205 does not represent the law of the case. The reference was not necessary to the Court's decision therein and constitutes nothing more than a dictum.

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11. The AT&T case in which the Court affirmed in part and reversed and remanded in part the Commission's Shared Telpak decision does not support AT&T's contention that a trial-type evidentiary hearing is required under § 205 of the Act. On the contrary, that case fully supports the Commission's choice of the proceeding here employed: "...§ 205(a) required the Commission to leave the matter of prescription for resolution on an adequate record after further proceedings." 449 F.2d at 452 The Court did not limit the Commission to any particular type of proceeding.

12. That the Commission has full discretion to select the proper form of compiling an adequate record and that the form selected need not be a trial-type proceeding (unless specifically required by statute) is amply demonstrated by the following remarks of the United States Court of Appeals for the District of Columbia Circuit in a recent case dealing with the adequacy of a record in an administrative proceeding:

"A few general observations are in order concerning the role of a court in this area. Absent extraordinary circumstances, it is not proper for a reviewing court to prescribe the procedural format which an agency must use to explore a given set of issues. Unless there are statutory directives to the contrary, an agency has discretion to select procedures which it deems best to compile a record illuminating the issues. Courts are no more expert at fashioning administrative procedures than they are in the substantive areas of responsibility which are left to agency discretion. What a reviewing court can do, however, is scrutinize the record as a whole to insure that genuine opportunities to participate in a meaningful way

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were provided, and that the agency has taken a good, hard look at the major questions before it.

"We have sometimes suggested that elucidation of certain types of issues, by their very nature, might require particular procedures, including cross-examination. In fact, we have been more concerned with making sure that the record developed by agency procedures discloses a thorough ventilati n of the issues than with what devices the agency used to create the dialogue.

"Of necessity, assessing agency procedures requires that the reviewing court immerse itself in the record. Abstract characterizations are an unsatisfactory guide for determining what procedures are necessary in particular proceedings. Alternative procedural techniques are usually available, and the absence of one device, such as cross-examination, may be compensated for by the sensitive use of substitutes. If review is to be meaningful, it must focus on the actual operation of the whole range of procedures in a particular setting -- including 'contexts of fact, statutory framework, and nature of action.'

* * *

"In order to determine whether an agency has lived up to these responsibilities, a reviewing court must examine the record in detail to determine that a real give and take was fostered on the key issues. This does not give the court a license to judge for itself how much weight should be given particular pieces of scientific or technical data, a task for which it is singularly ill-suited. It does require, however, that the court examine the record so that it may satisfy itself that the decision was based 'on a consideration of the relevant factors.' Where only one side of a controversial issue is developed in any detail, the agency may abuse its discretion by deciding the issues on an inadequate record.

"A reviewing court must assure itself not only that a diversity of informed opinion was heard, but that it was genuinely considered. '[T]he dialogue that the APA's rulemaking section contemplates cannot be a sham.' Since a reviewing court is incapable of making a penetrating analysis of highly scientific or technical subject matter

on its own, it must depend on the agency's expertise, as reflected in the statement of basis and purpose, to organize the record, to distill the major issues which were ventilated and to articulate its reasoning with regard to each of them.

"An agency need not respond to frivolous or repetitive comment it receives. However, where apparently significant information has been brought to its attention, or substantial issues of policy or gaps in its reasoning raised, the statement of basis and purpose must indicate why the agency decided the criticisms were invalid. Boilerplate generalities brushing aside detailed criticism on the basis of agency 'judgment' or 'expertise' avail nothing; what is required is a reasoned response, in which the agency points to particulars in the record which, when coupled with its reservoir of expertise, support its resolution of the controversy. An agency may abuse its discretion by proceeding to a decision which the record before it will not sustain, in the sense that it raises fundamental questions for which the agency has adduced no reasoned answers." Natural Resources Defense Council v. United States Nuclear Regulatory Commission, No. 74-1385, Slip. Op. pp. 18-23 (D.C. Cir. July 21, 1976) (footnotes omitted)

13. ATA submits that the procedure employed herein by the Commission was properly deemed "best to compile a record illuminating the issues." The three-stage comment procedure provided "genuine opportunities to participate in a meaningful way." The principal issues in this proceeding are policy-type issues concerning the future effect of any changes brought about by eliminating restrictions on resale of common carrier services. Evidence on issues of this character would perforce consist primarily of expert opinions. The evidence contained in this record is of similar character; and the same type of evidence would be present in any trial-type

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proceeding. Since the Commission provided for the service of all comments on all participants in this proceeding and the exchange of reply and answer comments, there was in substance as much opportunity both to rebut and answer all controversial contentions of the parties as would have been afforded by cross-examination in a trial-type record.

14. The Commission's Order herein constitutes the "reasoned response, in which the agency points to particulars in the record which, when coupled with its reservoir of expertise, support its resolution of the controversy." Natural Resources Defense Council, supra. Thus, the Commission devoted several pages to the discussion of the lawfulness of Telpak restrictions (Order, ¶¶ 43-49) and concluded that the record supported its finding that unlimited sharing was a just and reasonable practice which would bring about "important public benefits." (Order, ¶ 49) These benefits were in turn subjected to a comprehensive treatment in ¶ 79-88 of the Order. The Commission's decision not to require any changes in the restrictions on the resale of WATS and MTS were also extensively treated in ¶¶ 50-55 of the Order; and AT&T's economic impact study was subjected to a searching analysis in ¶¶ 56-62 of the Order. Clearly, "a reasoned response" to the contentions of AT&T and all other parties has been supplied by the Commission.

15. Thus, contrary to AT&T's assertion, the Commission

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found on the basis of the public record compiled in this proceeding that tariff restrictions on resale and sharing of private line services were unjust and unreasonable; that unlimited resale and sharing of such services would be just and reasonable; and the Commission prescribed unlimited resale and sharing of private line services as being just and reasonable. The fact that the Commission in this Order did not prescribe Telpak rates constitutes no defect. Telpak pricing was not an issue in this proceeding. It is an issue in Docket 18128; and the Commission recognized this in ¶ 43 of its Order.

15. For all of the foregoing reasons, AT&T's motion for stay should be denied.

Respectfully submitted,

American Trucking Associations, Inc.

Dated: August 23, 1976

PETITION FOR RECONSIDERATION

American Telephone and Telegraph Company (AT&T), pursuant to Section 405 of the Communications Act and Sections 1.106 and 1.429 of the Commission's Rules respectfully requests the Commission to reconsider its Report and Order (Order), released July 16, 1976 (FCC 76-641), prescribing unlimited resale and sharing of private line services. In support thereof, AT&T respectfully states as follows:

Request for Conference

The ultimate resolution of the issues raised in this proceeding is of fundamental significance in shaping the nature, extent and manner in which common carrier communications services will be provided in the future. Thus, the Order in question is of great and far reaching importance to both the providers and users of telecommunications service. Yet, as is demonstrated in detail herein, the Commission's Order represents an entirely inadequate effort to deal with the fundamental public interest issues. Moreover, apart from its substantive legal

infirmities, the Order simply falls far short of the standards for reasoned decision-making. The Order as presently framed is internally inconsistent and ostensibly inconsistent with other recent Commission determinations; it contains superficial and poorly reasoned analysis, and it is replete with imprecise definitions and terminology. In short, in its present form it is literally incapable of comprehension or implementation. In these exigent circumstances, in conjunction with the relief requested herein, we respectfully request that the Commission convene forthwith a one day conference of all the interested parties herein at which each of the Commissioners and the staff would be present in order to explore fully the nature of the Order, its ramifications on the public and carriers in terms of assuring the availability of efficient and economical service and our concerns with the difficulties of its implementation. It is our expectation that such an elucidation of the facts and issues attendant to understanding and implementation of the Order will be of great assistance to the Commission in its further consideration of this matter.

Introduction

1. The Notice of Inquiry and Proposed Rule Making (Notice), 47 F.C.C.2d 644 (1974), instituting this proceeding provided for three rounds of comments addressing the broad issue of whether, and under what conditions, resale and sharing of communications services should be permitted and, if so, whether

and to what extent the Commission should regulate such resale and shared use. The Commission specifically ordered (Notice, para. 40) that a First Report and Order would be issued after receipt of the comments. Instead, the Commission has now issued a final Order and terminated the proceedings.*

2. The Order is a radical departure from resale and sharing limitations that have been upheld repeatedly by the courts and regulatory agencies, including this Commission. If permitted to stand** in its present form, the Order will fundamentally change the very nature and structure of the telecommunications industry.*** Such drastic action should not be

* The Order implies that the parties hereto did not request further proceedings and thus are not entitled to any. Section 205 and decisions construing it say otherwise (see paras. 17-25 infra). Additionally, the parties hereto did, in fact, request further proceedings or state that the Commission should not take the action it has without further proceedings. See the Response of ARINC, paras. 34-48, 52; Tymshare, para. 10; Bunker Ramo, para. 11; ADAPSO, paras. 4, 9-10, 13; CBEMA, paras. 5-7; CITICORP, paras. 7, 14; AT&T, paras. 2, 43-47, 49-50; GTE, paras. IIA-C; MCI, paras. 9, 10, 52; ITT Worldcom, p. 1; See: Replies of: AT&T, para. 6; United, para. 6; GTE, paras. 11, 15, 16, 19F; Western Union, paras. 3, 6, 11; Telenet, pp. 7-16; MCI, para. 45; ARINC, pp. 9, 11, 23; UTC, para. 3; RPSS, para. 4; CBEMA, paras. 5, 13; SIAC, p. 10.

** AT&T filed a Motion for Stay of the Order on August 16, 1976.

*** The Commission states that it "foresee[s] expanded resale and sharing as resulting in the future development of a two-tiered interstate telecommunications industry and market structure. The first tier will be comprised of carriers offering basic communications channels and switching services in two markets -- to the public at the 'retail' level, and to other common carriers and resale carriers at the 'wholesale' level. The second tier will be comprised of carriers and other entities leasing the preponderance of their communications plant from the first tier carriers for . . . reselling" (para. 81.) This is a radical and major alteration of the role historically held by carriers.

taken without a more thorough and considered analysis, including a realistic assessment of the effects and consequences of the Commission's action on AT&T, other existing carriers and the public; or without adequate notice of the issues to be considered, and an opportunity for all parties to be fully heard; or without thorough consideration of other possible methods to achieve expanded resale and sharing without the detrimental effects which will flow from the radical approach adopted.

3. Comments were submitted by some forty-three (43) parties in this proceeding. None of these parties, with the sole exception of the Office of Telecommunications Policy (OTP) and Orlando Communications Club, Inc. (Orlando), advocated the extreme action of unlimited resale and sharing which has been prescribed by the Order. OTP, to the virtual exclusion of all other parties, was apparently relied upon by the Commission to support its decision. However, the OTP submission, even if it has any standing in this proceeding,* admits that serious consequences may ensue from what the Commission has now ordered and admits it does not know "the scale and direction of possible impacts" flowing from its recommendation (OTP, p. 29). OTP concedes that unlimited resale and sharing will have a detrimental effect on residential telephone subscribers by causing

* AT&T suggests to the Commission that the OTP "Comments" - filed some 2-1/2 months after the date for comments had passed - should not have any status in this proceeding. The letter transmitting the "Comments" states that OTP would be "pleased to have them placed in public record," but no order placing the "Comments" on record or requesting responses thereto was issued pursuant to para. 34 of the Notice of Inquiry, prior to the Order herein. Clearly, no opportunity was furnished for the refutation of OTP's specious and unsupported contentions.

increased interstate MTS rates and, through separations effects, increased intrastate MTS and local exchange rates (OTP, pp. 34, 36). OTP also recognizes that deaveraging of interstate toll rates will result (OTP, pp. 34, 36), that the impact on intrastate rates could be aggravated if there are shifts from MTS to private line (OTP, p. 36), that TELPAK will undergo major modifications and that such modification will result in increased communications costs to large customers and a possible shift of users to private microwave (OTP, p. 37). Thus, the only submission on which the Commission appears to rely admits that resale and sharing of communications services will be publicly detrimental - the standard by which the Commission asserts the lawfulness of its Order depends.* Yet, the Commission not only ignores any meaningful analysis of these points in its Order -- it admits that no "detailed proof of the benefits" of its action exists (para. 88, p. 56).

4. Despite such deficiencies, and in apparent disregard of the uncontradicted evidence of public and carrier harm submitted by AT&T and others, the Commission has undertaken, pursuant to Section 205 of the Communications Act, to prescribe regulations, practices and rates by ordering

* The decision states: "Under the principle set forth by the court in Hush-A-Phone and subsequently followed by the Commission in Carterfone and Referral of Chastain, the lawfulness of tariff provisions restricting resale and sharing of a particular service turns on whether unlimited resale and sharing of that service will be publicly detrimental." (para. 35) Yet, the decision is based on a record which fails to controvert the empirical data submitted by AT&T and other parties that demonstrates public detriment. And, in any event, the standard established by these cases is applicable to determining whether equipment may lawfully be directly connected to the interstate telecommunications network, not to whether use of service provisions are just and reasonable.

carriers to file revised tariffs providing for unlimited resale and sharing of private line services.

5. The Order, while limited in scope to resale and sharing of private line services, will affect the rates and provision of virtually all communications services. Private line services cannot be viewed in isolation from all other services. The Commission, however, ignores the ripple effect its Order will have on all basic services, both interstate and intrastate; fails to consider the migration of customers into other services that will inevitably result; and wholly fails to evaluate or consider the dramatic changes in the relationship between revenues, costs, prices, customer needs and demands of a variety of services which will result from the Order. The Order does not even discuss such vital concerns as the greater share of the revenue requirements that will be carried by basic exchange services and MTS if the Order becomes effective or the repricing of private line services which will result from the Order. There likewise is little analysis of either the fact that the total elimination of resale and sharing limitations for private line services will so fundamentally change the character of the market that it is questionable if some services (TELPAC and Series 7000, for example) will survive in their present form, or the fact that those changes may have the effect of frustrating the very purpose espoused in the Commission's Order - expanded resale and sharing.

6. To summarize, the Commission, in mandating at one fell swoop the elimination of resale and sharing

provisions for private line services, has simply ignored the significant and ineluctable effects of its Order,* including such matters as: destruction of the differing characteristics of the various private line services and the public purposes and discrete needs for which they are designed and offered, the new cross-elasticities of demand that will be created, the destruction of end-to-end service and responsibility, the deaveraging of rates which may occur, and the effect of the Order on other dockets. The ultimate effect of the Order will be to undermine the overall rate structure of all services and alter the very structure of the telecommunications industry to the detriment of the public and of AT&T. In addition, as discussed below, in its present form significant portions of the Order are subject to varying interpretations, making literal compliance therewith a veritable impossibility.

* The admitted effect of the Commission's Order is to require established carriers such as AT&T to offer facilities to other common carriers and resale carriers at the wholesale level (Order, para. 81), a market which it has never professed or undertaken to serve. It is beyond the Commission's authority to question the extent to which a carrier will dedicate its property to public service. In ordering AT&T to serve this new market, the Commission has unconstitutionally appropriated company property to a public service to which it had not been dedicated. See: *The Express Cases*, 117 U.S. 1 (1886); *Missouri ex rel. Southwestern Bell Telephone Co. v. Missouri Pub. Service Comm'n*, 416 S.W. 109 (Mo. 1967); *Weyauwega Telephone Co. v. Wis. Pub. Service Comm'n*, 111 N.W.2d 559, 14 Wis. 2d 538 (1961); *Interstate Commerce Comm'n v. Oregon - Washington R.R. & Navigation Co.*, 288 U.S. 14 (1933); *Frost and Frost Trucking Co. v. Railroad Comm'n of California*, 271 U.S. 583 (1926); *Georgia Power Co. v. Georgia Pub. Service Comm'n*, 211 Ga. 223, 85 S.E.2d 14 (1954); *Boston Real Estate Board v. Dep't of Public Utilities*, 334 Mass. 477, 136 N.E.2d 243, 250 (1956).

Summary of Position

7. At the outset, it is important to emphasize that AT&T is not opposed to a complete and thorough review of resale and sharing restriction with a view toward effectuating possible liberalizing modifications therein. Indeed, AT&T has made changes in its tariffs to permit expanded resale and sharing, when to do so is in the public interest, and has suggested in its Comments in this proceeding that other changes might be desirable. (AT&T Comments, paras. 71-73.) What AT&T is opposed to is the hasty and indiscriminate abolishment of all private line resale and sharing limitations. A wholesale elimination of resale and sharing prohibitions such as ordered herein will drastically affect the public and the carriers in an adverse manner.

8. The Order herein is premised on errors of fact and law and purports to be based upon a record which is procedurally and substantively inadequate. The legality of the Commission's procedures and Order will be discussed in Part I, paragraphs 15-39 herein. We will demonstrate that the Commission's Order is contrary to a well-established body of law upholding the reasonableness of resale and sharing prohibitions, that the prescription of practices and rates ordered by the Commission is not in accord with Section 205(a) of the Communications Act and that the findings of the Order have no rational basis in the record.

In relegating the Section 205 full hearing requirements to a mere Notice and Comment proceeding, and in failing to find the prescribed rates to be just and reasonable, the Commission has ignored the statutory mandate under which it derives its authority to regulate carrier practices and rates. The resulting prescription will not withstand judicial review.

9. In addition, the Commission's Order lacks any rational basis in the record and is unsupported by any reliable, probative or substantial evidence. In fact, many of its findings are either supported by no evidence, but instead rationalized on the basis of unjustified expectations, or are based upon incorrect or mutually inconsistent terminology. Such capricious and arbitrary action is unlawful. Moreover, it is fundamental to due process that in any proceeding the parties must be adequately informed of the issues to be considered, so that they may respond thereto both directly and in rebuttal. We will demonstrate that AT&T was denied this fundamental due process. In these circumstances, reconsideration and further proceedings should be ordered.

10. Part II of this Petition will address four specific issues that must be reconsidered and clarified. First the Order clearly states the Commission's intent not

to permit resale and sharing of private line services to be used as a vehicle to convert a private line service into Long Distance Message Telecommunications Service (MTS) or other form of public switched message service. In spite of this laudable objective, AT&T will show that the Order -- unless reconsidered and clarified -- may be interpreted to permit entities to establish duplicative switched public message services through resale and sharing of Common Control Switching Arrangements (CCSA) and foreign exchange (FX) services. Such "shared FX and CCSA" will compete directly with, and divert significant traffic from, the public switched telephone network.

11. Second, the Order could conceivably be read to mandate unlimited resale and sharing of AT&T's video service channel offering (Series 7000) for non-video uses -- a matter of serious concern to AT&T. If permitted to stand in its present form, the Order may result in impeding technological developments which AT&T had intended to introduce in the very near future and could cause substantial increases in video rates, to the overall detriment of the viewing public.

12. Third, the Commission's prescription of unlimited resale and sharing of Series 5000 (TELPak) services is based upon speculation and conjecture and is contrary to uncontroverted evidence submitted by AT&T. Unless reconsidered, substantial economic harm to AT&T, its customers and the overall public will result.

13. Fourth, the effect of the Order is inconsistent with both the specific terms and the intent of the Settlement Agreement reached by the parties in F.C.C. Docket No. 20099, and the Commission's Order accepting that agreement. The Order ignores the well-recognized distinction between facilities and services and, as a result, for example, resellers may feel entitled to order facilities offered in Other Common Carriers (OCC) facility tariffs. The Order also abolishes to a significant degree the distinction between carriers and customers which is a fundamental underpinning of the agreement and the rights and obligations spelled out therein.

14. In addition to the four issues summarized above, Part II hereof also points out other significant deficiencies which permeate the entire Order, further demonstrating why reconsideration is needed of the Order in its entirety. We will show that the basic underpinnings of the Order are so confused and indefinite that the level of understanding of the ultimate effect of the Order which would be required for its implementation is impossible. Unless the meaning of terms upon which the Order is based -- such terms as underlying carriers, 1st tier carriers, 2nd tier carriers, resale, resale entities, other entities, intermediary, non-profit, facilities, services, plant and numerous others -- are clarified and made mutually consistent, the implementation of the Order will cause chaos in the industry. Finally, certain miscellaneous items are addressed in Part II.

I. LEGALITY OF THE COMMISSION'S
REPORT AND ORDER

15. Telecommunications common carriers have, since their very beginnings, generally prohibited resale and third party use of communications services, on the basis that such use would destroy the telephone companies' rate structure, cause increased rates to the general body of subscribers, threaten efficient regulation and contravene public policy. Courts and regulatory commissions have regularly and consistently upheld such provisions as just and reasonable,* often finding as inappropriate and contrary to law what the Order now envisions, viz., the furnishing by telephone companies of a significant portion of their services to others at wholesale.**

16. In the face of this well-established body of law, despite the fact that this Commission itself has sustained such provision since its inception, and despite the fact that not a single carrier and only one customer party (Orlando) to this proceeding* advocated such a position, the Commission has here found all existing resale and sharing limitations on private line services to be unlawful** and has prescribed the unlimited resale and sharing of such services. These findings are unlawful because: First, prescription of practices and rates cannot legally be accomplished without an evidentiary-type hearing and without a finding that the prescribed practices and rates are just and reasonable. Neither the procedures used by the Commission in this case nor its findings meet these requirements. Secondly, the Commission's Order is improper because it is not supported by the record and is in other respects arbitrary and capricious.*** Finally, the

* Orlando's interest is so minor in the context of the ambit of the Order as to be not material.

** The Notice in this proceeding was to determine the prospective public policy as it applies to common carrier tariff offering relative to resale and sharing of services. AT&T requests clarification of the Order to make clear that the findings of unlawfulness therein apply prospectively with the filing of tariffs in compliance with the Order.

*** The railroad industry cases relied on by the Commission (para. 37) to support its findings are admitted by the Commission "not [to] be completely analogous" to resale and sharing of telecommunications (para. 41, n. 63).

parties were denied fundamental due process in that they were not informed of certain of the issues disposed of in the Order.

A. The Commission's Prescription of Practices and Rates Is Not In Accord With Section 205(a)

17. The Commission's authority to prescribe practices and rates emanates from Section 205(a) of the Communications Act. That authority is not unlimited. Rather, the Commission must comply with the statutory scheme of the Act and, in particular, when material questions of fact are involved, Section 205(a),* which expressly require a "full opportunity for hearing." It has been held by the United States Supreme Court, by this Commission and by reviewing courts, that the procedures which were employed in the instant Order do not meet the hearing requirement of Section 205(a).**

1. An evidentiary hearing is required.

18. As properly noted in the Order, "the Communications Act of 1934 was largely modeled on the I.C.A., apparently

* Section 205(a) provides in its relevant part as follows:

"Whenever, after full opportunity for hearing, . . . the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum charge or charges to be thereafter observed, and what classification, regulation or practice is or will be just, fair, and reasonable, to be thereafter followed"

** It should be noted that the instant proceeding is in no sense a proposed rulemaking proceeding. No rules were ever proposed.

to take advantage of the established body of law construing the latter statute" (Appendix D, p. 6, para. 6). Thus, in determining the type of proceeding necessary to comply with Section 205(a), the hearing required under its predecessor section (Section 4(i)) of the Interstate Commerce Act is persuasive. In construing the predecessor of Section 205(a), the United States Supreme Court left no doubt that an evidentiary-type hearing is required. The Court stated:*

"... the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the findings" ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93-94 (1913).

19. Like its predecessor, Section 205(a) has been found to require an evidentiary hearing before practices or rates can be prescribed. In National Association of Motor Bus Owners v. F.C.C.** the court, in discussing the Commission's decision not to prescribe a remedy after the Telpak

* The United States Supreme Court in Morgan v. United States, 298 U.S. 468, 479, 480 (1936) also considered the meaning of the term "full hearing." Chief Justice Hughes inquired, "What is the essential quality of the proceeding under review and what is the nature of the hearing which the statute prescribed." He then answered: "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the triers of facts."

** 460 F.2d 561, 564 (2d Cir. 1972).

Sharing decision,* stated that evidentiary hearings were necessary under Section 205(a).

"The Commission was faced with the prospect that if it continued to employ the first of the alternatives available (prescription) there would be a long delay occasioned by the necessity of holding evidentiary hearings and making findings pursuant to § 205(a) before a final order could be entered

* * * * *

"As we pointed out earlier, however, the Commission's assumption that elimination of all sharing would be unlawfully discriminatory was unwarranted in the absence of evidentiary hearings and findings." (Emphasis supplied.)

20. This Commission has likewise concluded that evidentiary hearings are mandated by Section 205(a). After having been reversed by the Second Circuit for prescribing unlimited sharing of Telpak, the Commission elected not to conduct the evidentiary proceeding required by Section 205(a). The Commission stated:

"If . . . the Commission desires to prescribe the specific course of action that the carriers must take in eliminating the unlawful discrimination, the Commission should conduct further proceedings to develop a fuller evidentiary record upon which to base such prescription." In Re: Telpak Sharing, 31 F.C.C.2d 674, 675 (1971).

* 23 F.C.C.2d 606 (1970).

It thus is crystal clear that Section 205(a) requires an evidentiary-type hearing before rates and practices can be prescribed.

2. Notice and comment procedures are not sufficient

21. The failure to afford the parties an evidentiary-type hearing in favor of the Notice and Comment procedure here adopted cannot be justified by the absence of the words "on the record" in any section under Title II of the Act requiring a hearing, as contended in the Order. (Appendix D, p. 4, para. 5). The very decisions cited by the Commission to support this position demonstrate that the lack of such words is not determinative of whether an evidentiary-type hearing is required. In Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973), the decision primarily relied upon in the Order, the court's discussion of the appropriate type of hearing needed before rates can be prescribed demonstrates the inadequacy of the Notice and Comment procedures utilized herein. The court states that:

"... it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence 'substantial' enough to support rates."
(483 F.2d at 1260)

In summarizing the hearing requirement needed the court stated:

"There must, however, be some mechanism whereby adverse parties can test, criticize and illuminate the flaws in the evidentiary basis being advanced regarding a particular point. The traditional method of doing this is cross-examination, but the Commission may find it appropriate to limit or even eliminate altogether oral cross-examination

and rely upon written questions and responses
But whatever procedure is followed, it must assure
that the Commission has a substantial evidentiary
basis for its findings and it must provide the
court with an adequate record on review." (Id.
at 1262-63).

The Court goes on to point out that a variety of procedures is available depending on the particular matter in controversy. In a case such as the present where there are serious factual issues as well as the prescription of rates and practices, the requirements for a fair proceeding are far stricter than would be the case where, for example, only general policy pronouncements are being made. In the present case, of course, the tariffs of the individual carriers are directly, immediately and specifically affected. The requisite evidentiary basis enunciated by Mobil is entirely lacking in the instant case.

22. The Order also relies on United States v. Florida East Coast, 410 U.S. 224, 238 (1973). In that case the Supreme Court specifically stated that the words "on the record" are not words of art and that other language could trigger the provisions of Sections 556 and 557 of the Administrative Procedures Act on rulemaking proceedings.

23. A more recent decision by the United States Court of Appeals for the District of Columbia Circuit has also found the absence of the words "on the record" not to be determinative of the procedures which must be followed under the Administrative Procedures Act (APA). In

Independent Bank A. of Ga. v. Board of Gov. of F.R.S., 516 F.2d 1206 (D.C. Cir. 1975), the Board of Governors argued that "when a statute contains no 'on the record' requirement, the informal rulemaking requirements of 5 U.S.C. 553 apply and the provision for a hearing may be satisfied by evidentiary submission in written form only" (p. 1217). The court disagreed, noting that:

"... the Board's determination as to the balance of 'public benefits' and 'adverse effects' which inhere in a particular application is essentially adjudicative in character. The Board has a quasi-judicial function here which can be properly implemented only through the use of trial-type procedures." (p. 1218)

The Commission's prescription of unlimited resale and sharing practices for carriers is based upon a weighing of "public detriment" and "countervailing benefits" (Order, para. 35, p. 28; para. 40, p. 31). In the present context, such matter clearly contemplates the resolution as between different and contrary factually premised positions. Such resolution must of necessity involve the determination of factual issues. As in the Independent Bank case above, written submissions alone will not suffice as a substitute for trial-type proceedings in the present case.*

* Without commenting on the lawfulness of the "paper" proceedings in recent cases such as Docket Nos. 19919 (Hi/Lo) and 19989 (WATS), it is apparent that the Notice and Comment procedure employed herein differs significantly from the procedures employed in those cases. Indeed, the procedures there employed were explicitly intended by the Commission to serve as a surrogate for cross-examination and discovery and the former was available upon a reasonable showing of need.

24. The Commission's reliance on Sections 4(i) and (j) is admitted by the Order to "not be sufficient to dispense with an evidentiary hearing if Section 205(a) were interpreted to require it." (Appendix D, p. 8, para. 7.) In AT&T v. FCC, 487 F.2d 865, 874-875 (2d Cir. 1973), the court said:

"To permit the Commission to achieve the same result as it would pursuant to a Section 205 rate prescription, by circumventing the stature hearing and finding requirements on the basis of its claimed broad inherent regulatory power, would defeat the purpose of Section 205 and vitiate the specific statutory scheme."

25. The Notice and Comment procedures utilized herein fall far short of the evidentiary hearing required by Section 205(a). The parties were denied, for example, the opportunity to determine what factual basis, if any, justified the conclusions of the Office of Telecommunications Policy (OTP) that public benefits from unlimited resale and sharing would outweigh public detriments.* Without such facts, the validity of the OTP conclusions could not be tested, verified or rebutted. Yet it is precisely these unsupported "benefits" which the Commission adopts in the Order (para. 75, p. 51). AT&T likewise was unable to question or rebut the summary rejection of both its revenue loss projections and the other

* Even assuming the OTP Comments have any status in this proceeding (see AT&T Motion for Stay filed 8/16/76, para. 15, n. **, and para 3, n.*supra), they were submitted 2-1/2 months after the deadline, thus giving AT&T and others an inadequate opportunity to respond.

public detriments which it demonstrated would flow from removal of resale and sharing restrictions. It was further foreclosed from ascertaining and rebutting the unexplained factual basis, if any, upon which so many undocumented and unsupported conclusions relied upon in the Order were drawn.* Without reconsideration by the Commission, a major and drastic change in the telecommunications industry will be implemented based upon nothing but the Commission's unsupported judgment that the benefits of resale and sharing appear to outweigh the detriments. (Order, para. 40, p. 31)

26. The Commission cannot ignore the statutory mandate under which it derives its authority and relegate the Section 205(a) full hearing requirement to a mere Notice and Comment proceeding in the present matter. As stated in American Telephone and Telegraph Co. v. F.C.C., 487 F.2d 865, 881 (2d Cir. 1973):

"The ratemaking provisions of the Communications Act were intended to provide for orderly processing of proposed rate revisions. [citing case] In balancing the various interests involved Congress provided the comprehensive statutory plan discussed above [§§ 203-05]. The Commission is not authorized to circumvent this statutory scheme by making its own equitable adjustments."

* The Commission goes far beyond that latitude given to its expertise in Market Street Railway v. Railroad Commission, 324 U.S. 548 (1945) and its progeny. The instant determination does not use above the level of simple conjecture, speculation and wishful thinking.

The Notice and Comment procedures utilized herein do not meet the "full hearing" requirement of Section 205(a). The prescription resulting therefrom will not withstand legal scrutiny.

B. A Finding That the Prescribed Practices and Rates Are Just and Reasonable Is Required

27. The natural and practical consequence of the Order's prescription of unrestricted resale and sharing of private line services will be that many customers will migrate from MTS and WATS to FX, CCSA and other shared private line services; from Series 2000 and 3000 to TELPAK C and TELPAK D; and from TELPAK C to TELPAK D. After switching to these services, these customers will be paying rates different from those they were paying before.* AT&T v. FCC, 449 F.2d 439, 451, n.12 (2d Cir. 1971) makes it clear that the Order thus is a prescription of rates and that the Commission must follow the statutory procedures for ratemaking or be reversed on appeal.** The court stated:

* The Commission at one point in its Order denies that unlimited resale and sharing will require "any substantial repricing of TELPAK" (para. 48). It turns around at another point in its Order and rejects the AT&T estimate of revenue effects on the grounds that it was predicated on the false assumption that "TELPAK and WATS rates stay constant (para. 62).

** The courts have uniformly held that it is the actual impact of agency action, and not its form, that determines the nature of the findings and evidence required to support the action. See: Baltimore and Ohio RR v. U.S. 277 U.S. 291, 300 (1929); AT&T v. FCC, 449 F.2d 439, 451 (2d Cir. 1971); AT&T v. FCC, 487 F.2d 865 (2d Cir. 1973); Houston Belt and Terminal Ry. v. U.S., 153 F.Supp. 3, 7-8 (S. D. Tex. 1957), aff'd, 356 U.S. 23 (1958); Moss v. C.A.B., 430 F.2d 891 (D. C. Cir. 1970).

"The impact of its order requiring unlimited sharing is to fix and prescribe rates for application to an enlarged group of customers; and since the lower Telpak rates are not now available to this enlarged group, the order in effect is equivalent to an order requiring a widespread rate reduction. Under § 205(a) the Commission cannot prescribe a rate without finding that the rate prescribed is just and reasonable."

28. In this proceeding, the Commission not only has failed to hold the evidentiary hearing necessary before practices and rates can be prescribed, it has failed to find the rates prescribed to be "just and reasonable" within the terms of Section 205(a).^{*} It is thus clear that the procedures employed herein did not comply with the requirements of Section 205(a).

^{*} Indeed, the Commission could not possibly have so found. First, no evidence of record exists on which to find the prescribed rates to be just and reasonable. Secondly, as the court intimated strongly in *AT&T v. FCC*, 449 F.2d at 452, a prescription of unrestricted Telpak sharing amounts to a finding that Telpak's bulk rate structure is itself unlawful. Apart from the obvious lack of record evidence and findings to that effect in this proceeding and the fact that this issue is squarely before the Commission in another proceeding (Docket No. 18128), such a finding flies in the face of the prior Commission decision upholding the competitive justification for Telpak C and D. 38 F.C.C. 207 (1964); 37 F.C.C. 1111 (1964); 38 F.C.C. 761 (1965), aff'd, *American Trucking Ass'ns v. FCC*, [377 F.2d 121 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967)]. The Commission has thus attempted to do here precisely that which the Court of Appeals held it could not do in the Telpak Sharing case.

C. The Commission's Order Lacks a Rational Basis in the Record

29. The record compiled in this proceeding wholly fails to support or justify the findings made by the Commission's Order, both as to the general prescription of practices and rates (see paras. 17-28, supra) and as to the specific findings contained throughout. More generally, it is hornbook law that all Commission determinations of decisional significance must be rationally supported by the record (see, e.g.: Hawaiian Telephone Company v. FCC, 498 F.2d 771, 777 (D.C. Cir. 1974) accord, American Trucking Associations, Inc. v. FCC, 377 F.2d 121, 124 (D.C. Cir. 1966), cert. den., 386 U.S. 943 (1967)) and its ratio decidendi must be apparent on the face of the decision. In the instant proceeding, with the exception of the OTP and Orlando, none of the 43 participating parties advocated the extreme action of unlimited resale and sharing of private line services which has been prescribed by the Order. In fact, most parties shared AT&T's concern that greatly expanded resale and sharing as ordered herein would detrimentally affect the public through adverse rate, service and pricing consequences* and stressed the

* The adverse rate and pricing effects associated with unlimited resale and sharing of private line services were discussed in AT&T Comments, paras. 37-47, 49-52, 57, 58, 60-64; in AT&T's Reply, paras. 1, 7, 8; and in AT&T's Response, paras. 18-22, 24, 33-35. The adverse service effects were discussed in AT&T's Comments, paras. 65-69; and in AT&T's Response, paras. 28, 29, 36.

Also See Comments of: United, p. 6; SPCC, paras. 6, 7; GTE paras. 2-3, 2-7; Western Union, para. 1; Telenet, paras. 21, 22.

(cont'd)

diversion of revenues which will result therefrom.* Other parties cautioned that removal of resale and sharing restrictions could create a chaotic condition in the industry by undermining AT&T's rate structure and urged the Commission to proceed with due caution.**

30. Of the two proponents of unlimited resale and sharing, Orlando's comments were not even mentioned by the Commission as supporting its order, as well they could not, since they contain no facts, studies or other documentation to support their unwarranted and self-serving conclusions.

(cont'd)

See Reply Comments Of: United, paras. 5, 8, 11; GTE, paras. 7, 8, 19; SPCC, paras. 1, 3, 4; ATA, paras. 4, 5; NAMBO, p. 2; Central Committee, paras. 5, 6; XERO-FAX, para. 10.

See Response of: ATA, paras. 6, 11, 18; GTE, paras. IIIB, IIIC1c, IIC5b, IIIC6b; MCI, para. 20; SPCC, p. 5.

* See Comments of: GTE, paras. 1-5, 1-13, 2-4; United, p. 6; MCI Reply to Comments on Petition for Rulemaking, para. 34; SPCC, para. 7.

See Reply Comments of: United, para. 8; GTE, para. 6; ATA, paras. 4, 5; XERO-FAX, para. 10; Bunker Ramo, paras. 9-14.

** See Comments of: GTE, paras. 2-3, 2-7, United, p. 6; SPCC, para. 6; Telenet, paras. 21, 22; Western Union, para. 18.

See Reply Comments of: GTE, paras. 4, 10, 11, 15, 19; Western Union, paras. 3, 11; Telenet, p. 7; RCA Globcom, paras. 2, 3; ARINC, pp. 3, 9, 18; ARINC, pp. 9, 10, 18; ATA, para. 27; UTC, paras. 3, 4, 5.

See Response of: ADAPSO, para. 10; CBEMA, paras. 4, 7; MCI, paras. 10, 52.

The Comments submitted by OTP concerning the detrimental effect of the Commission's decision are summarized in paragraph 3 of this Petition. It would serve no purpose to reiterate them here except to point out that OTP correctly recognized that the Commission's decision could be harmful.

31. None of the parties, nor the Commission, submitted any economic data or analysis which are supportive of the Commission's findings or which controvert AT&T's conservative quantification of the adverse revenue and costs effects that would flow from this decision.* It is clear then that the Order can not be rationally based upon the record in this proceeding. Rather, it is based upon conclusions for which the Commission can cite no record support -- because none exists. Further, the Order ignores or arbitrarily discounts evidence contrary to its conclusion, or simply asserts that nothing in the record controverts its conclusions. While the Commission's

* AT&T's comments explained that it would take 70 full time people approximately 3 years, at an approximate cost of \$20 million, to quantify the effects of unlimited sharing on revenues and costs. This estimate was not refuted on the record, but was rejected without cogent explanation by the Commission. The analysis submitted was the best possible within the time confines established by the Commission and the assumptions therein were based upon actual data and methods from past studies. The AT&T analysis is the only empirical evidence in the record of the effects of the Commission's action and it clearly does not support the Commission's decision. The Commission rejects these studies in conclusory terms, on the basis of decisions reached after those studies were submitted, but without giving AT&T any chance to correct those alleged deficiencies. The Commission did not dispute the study results. It said only that the study was "methodologically defective" (Order, para. 58).

expertise must be accorded considerable latitude, its determination of matters of great complexity and crucial significance cannot be sustained in the present circumstances.

32. A brief review of the Commission's Report and Order will confirm the lack of any rational basis in the record to support the Order and illustrate that its conclusions are based on nothing more than mere conjecture and speculation. For example, the Commission states it "do[es] not view" a middleman interpositioned between carriers and the public as contrary to the public interest, "reject[s] [without any facts or reasoning] the argument that the imposition of a middleman . . . is justification for the restrictions on resale and sharing" and is "reasonably certain that widespread resale will have the opposite effect" of the discrimination alleged by GTE (para. 39). The Commission cites no record support for these conclusions.*

33. On the issue of revenue and rate structure effects, the Commission states "we do not view tariff restrictions on resale as justified merely because they protect carrier revenues or rate structures," that it "believe[s] that the

* The record is replete with support for the proposition that the interpositioning of middlemen between a carrier and the public is contrary to the public interest. See, for example the Comments of: AT&T, paras. 65-69; GTE, 2-2), 2-2(e); and the Responses of: AT&T, paras. 28, 29, 30; GTE, para. III C 1 c, III C 2, III C 3, III C 5 a-d, III C 6 a-b.

only revenue losses of consequence in assessing the lawfulness of tariff restrictions on resale and sharing are those which ultimately burden subscribers to the carrier's services"* and that it "expects" the benefits to outweigh any possible adverse consequences (para. 40). Again, no record support for these beliefs and expectations of the Commission is provided and, again, it simply ignores the record support to the contrary.**

34. The Commission's determination that the tariff restrictions are unlawful under § 202(a) (para. 41, p. 32) is stated thusly: "we do not believe that carriers can deny service to resale entities merely because the latter offer competition . . . we do not view revenue losses or rate structure changes which may result from such competition as automatically justifying a denial . . . [n]or do we believe that carriers may deny service to prospective resellers because they lack a 'communications requirement of [their] own for . . . use'." No record support is given for these views. Such "iffy" wishwashy terminology can hardly support the ultimate mandates of the Order which are significant and far reaching in effect.

* AT&T, in attachment I to its comments, quantified the revenue losses it can expect: Such losses surely will "ultimately burden subscribers."

** The record in this proceeding is full of illustrations of the adverse consequence of the Commission's decision. Virtually every party discussed such consequences (see para. 29, supra).

35. The Commission's holding that TELPAK resale and sharing restrictions are unlawful likewise has no rational basis in the record. In the five pages the Commission devotes to the unlawfulness of the Telpak restrictions (pp. 34-38), it refers to no record support for its conclusion. Instead, the decision attempts to discredit record support justifying the TELPAK resale and sharing restrictions,* and ipse dixit rejects ARINC's competitive necessity argument as well as AT&T's discussion and quantification of the adverse revenue and cost effects from removing TELPAK restrictions.**

36. The above examples are a few of many which demonstrate the complete lack of any substantial record support for the instant Order. Perhaps in recognition of the absence

* Even OTP, the only party advocating unlimited resale and sharing, recognizes that the ultimate result will be a major modification of TELPAK, increased cost to large customers and a possible shift of users to private microwave (OTP Comments, p. 37).

** See AT&T Comments: paras. 49-56, Attachment I; AT&T Response, paras 19-20. The Order's rejection of AT&T's revenue loss quantification is based in part on the claim that AT&T failed to support the assumptions used therein. (Para. 61, p. 42.) It then turns around and criticizes Western Union for not conducting a study of the resale and sharing effects on its service, stating "that Western Union could have made various assumptions of its own to demonstrate the impact of unlimited resale and sharing of its services." (Para. 72, p. 48.)

of any rational basis in the record for its Order, the Commission takes the position that AT&T has failed in its burden of proof in this proceeding (Order, para. 42). In the first place, Section 205,* as well as the Notice instituting this proceeding,** place the burden of proof on those who would find the carriers' longstanding resale and sharing provisions unlawful***

* Under section 205 of the Communications Act, a tariff provision may be set aside only if, after full opportunity for a hearing, it is found that such provision ". . . is or will be in violation of the provisions of this act . . ."

** The Notice states that such parties must "[f]ully justify any recommended tariff changes" (Notice, para. 31, item 10, p. 18). See also: 42 Am. Jur., Pub. Adm. Law, Section 131, Platt v. Le Cocq, 158 F. 723 (8th Cir., 1907).

*** The applicable law is stated in Gulf Tele-Magnet Corp. v. Southern Bell Tel. & Tel. Co., 87 P.U.R.(n.s.) 33, 37 (La. Pub Serv. Comm'n 1951).

"In a proceeding like this, resting upon a complaint seeking to set aside or modify an approved tariff provision of many years standing, as a matter of law, a heavy burden of proof rests upon the complainant to prove the unreasonableness of said tariff provision."

In the case styled Denegre v. La. Pub. Serv. Comm'n, 242 So. 2d 832, 836, the Louisiana Supreme Court held:

"Hence, whenever anyone invokes the authority of the Commission to Act, he must make a showing that the action requested is in the public interest or, at least, will not adversely affect the public interest."

or otherwise inappropriate. Second, regardless of what party has the burden of proof, no decision can stand unless it is based upon reliable, probative and substantial evidence of record. As stated by this Commission in Tariffs-Evidence, 40 F.C.C.2d 149, 152 (1973):

"... irrespective of where the burden of proof lies, we must make our decision on the basis of reliable, probative and substantial evidence of record whether adduced by the carrier or other parties."

37. In summary, there clearly is no "reliable, probative and substantial evidence of record" in this case to support either the prescription of unlimited resale and sharing practices of private line services and the resulting prescription of rates, or the other specific findings contained in the entirety of the Order. It is apparent that questions of great significance and complexity surround the Order and that the public interest would be served by a reexamination of the issues in further proceedings.

D. The Order is Deficient on Due Process Grounds

38. It is fundamental to due process that in any proceeding the parties are to be adequately informed of the issues to be considered and the extent to which the government agency will proceed in its investigation, in order that the affected parties may respond both directly and in rebuttal. The Notice instituting this proceeding requested comments addressing specified issues generally concerned with whether,

and under what conditions, resale and sharing of communications services should be permitted. The parties were further advised (Notice, para. 40) that a First Report and Order would be issued. The Notice did not inform the parties of the numerous issues that have now been adjudicated in the instant Order -- and the parties obviously were denied all opportunity to be heard on such issues.*

39. All opportunity to be advised of, or heard on, the numerous matters disposed of in the Order was foreclosed when the Commission, contrary to the intent specified in the notice, issued a final Order rather than a First Report and Order. The Order itself recognizes that the parties hereto had every reason to expect oral hearing on the various issues resulting from the notice. The Order states:

"We also stated in the Notice (paragraph 40) that we would issue a First Report and Order after receipt and consideration of the comments, thereafter designating for oral hearings other issues as required." (Order, para. 2.)

Fundamental due process dictates that appropriate evidentiary hearings be provided so that all parties may properly address the issues and provide the Commission with a thorough record on which to base its determination.

* AT&T, for example, could not reasonably have predicted - and was not advised by the Notice - of such action as the obvious inconsistencies between the Order and the Docket No. 20099 Settlement Agreement (see paras. 66-69, *infra*); the apparent prejudgment of the basic lawfulness of the TELPAK offering, and the appropriate rates therefore, which are issues in Docket No. 18128 (see paras. 57-65, *infra*); the likely changes in the fundamental nature of certain service offerings (see paras. 48-56, *infra*); and a myriad of other items discussed in Part II of this Petition.

II. SUBSTANTIVE MATTERS REQUIRING
RECONSIDERATION AND CLARIFICATION

40. Four major matters which need to be reconsidered and substantially modified or clarified are discussed in subparts A through D below. These matters are:

- A. The effect of the Order on the establishment of switched public message services and networks;
- B. Resale and sharing of Series 7000 (television) private line service;
- C. Resale and sharing of Series 5000 (TELPAK) private line service; and
- D. The effect of the Order on the Docket No. 20099 Settlement Agreement.

41. Subpart E will address the need to reconsider the Order in its entirety because of its inconsistent and improper use of terminology. Certain miscellaneous matters are also covered in Subpart E.

- A. The Effect of The Order May Be to Permit
the Establishment of Redundant Switched
Public Message Services and Networks

42. The Order must be substantially clarified and modified to be consistent with the Commission's recent Execunet decision.* Without clarification, public message services (and networks) similar to AT&T's MTS and WATS may

* In re: MCI Telecommunications Corp., Docket No. 20640, Decision released July 13, 1976 (FCC 76-622).

be created. This explicitly unintended*result can be correct by a clear and unequivocal statement that the conditions necessary for any offering to constitute a private line service, as determined in the Execunet decision**, were in no way intended to be modified by the Order.

43. The Commission should make it crystal clear that a "dedicated facility" is, by definition, one which is for the customer's "private use," as stated in the Execunet decision, and may not be shared with, or resold to, others. The sharing of FX and CCSA envisioned by the Order must

* The Commission intent is stated in paragraph 64:

"Unlimited resale and sharing of private line service does not, of course, encompass the conversion of that private line service into MTS or the equivalent thereof. Thus, any resale or sharing of FX service must maintain the basic private line character of that service. Under present policy, to qualify as a private line service, at least one aspect of the service must be a dedicated facility not used or usable for local telephone exchange service."

** The Commission's Execunet Decision, supra, delineated two characteristics which constitute a sine qua non for private line service. It found that a private line service must "either originate or terminate at a specific location designated by the customer via a communications channel dedicated to his private use and not used or useable for public communications services" and "access only those distant locations (including, if appropriate, distant telephone central offices) specifically designated by the customer to meet his private communications needs" (Decision, para. 61). The Order herein inadvertantly omits the second criteria. The Execunet decision also requires that the service not have functional characteristics similar to the essential characteristics of MTS or WATS if it is to be a private line service.

be accomplished through the provision of a "dedicated facility" from the user's premises to the switch accessing the shared intercity facilities.

44. Further, the Order must be modified to make it clear that any services which are offered as a result thereof satisfy the second necessary threshold criterion of a private line service established by the Execunet decision: viz., that it "must access only those distant locations (including, if appropriate, distant telephone central offices) specifically designated by the customer to meet his private communications needs."* As a result, the Order should state that resale or sharing of exchange service is not envisioned and that, in fact, such would be contrary to prior Commission decisions.** Thus, the sharing of FX envisioned by the Order must be accomplished by each user subscribing to his own exchange service for connection through a switch to the shared intercity facilities.

45. These clarifications will help to prevent the establishment of services functionally equivalent to either MTS or WATS, which the Commission determined in its Execunet decision

* Execunet decision, supra, para. 61; footnote, para. 42.

** Execunet decision, supra; In re: AT&T, Interconnection With Specialized Carriers In Furnishing Interstate FX and CCSA, Memorandum Opinion and Order released October 16, 1975 (FCC 75-1146).

would be impermissible.* On the other hand, absent these clarifications, the possibilities of creating networks and services duplicative of MTS and WATS are limited only by one's ingenuity. A hotel, for example, could permit its guests to use "shared FX" as an MTS substitute. A chain of hotels, or other multicity businesses, could utilize a "shared CCSA" to establish their own subtending MTS networks. Storefront MTS businesses selling long distance calls could easily be established. Retailers could advertise free or discounted MTS to attract customers. Clubs could do likewise to attract members. Department stores, grocery stores, and other national retail chain outlets could permit their customers' use of a "shared CCSA" arrangement as an MTS substitute. These are but a few of the many examples of the means by which resold or shared FX or CCSA could be used as duplicative public message services equivalent to MTS.**

46. In the case of "shared FX or CCSA arrangements," even if the meaning of a dedicated facility were clarified as requested, services equivalent to WATS can be duplicated unless

* The Commission in its Execunet decision, supra, page 22, footnote 8, stated that "WATS, like MTS, is not subject to competition, pursuant to the Specialized Common Carrier decision. . . ." (29 F.C.C.2d at 911)

** These examples also demonstrate why the Commission should reconsider its holding that resellers need not make a showing of public need (Order, para. 104) and sharers need not be regulated (Order, para. 120).

it is made clear that exchange service is not subject to the Order's prescription of resale and sharing. Such clarification is wholly consistent with existing FX and CCSA offerings, both of which terminate at a telephone company central office for interconnection with a customer's exchange service. The exchange service is furnished by the telephone company directly to the customer subject to the applicable intrastate exchange tariffs.* Unless so clarified, a reseller could merely order dedicated access lines from the reseller's location to each of his patron's locations. At the reseller's location these access lines could be interconnected through switching equipment to indiscriminately shared (commonly used) intercity channels, each of which is terminated at the distant end in an exchange line subscribed to by the reseller and resold as part of his service. This configuration was recently held unlawful by the Commission** and is functionally equivalent to WATS since both would have a dedicated access line, commonly used intercity circuits and exchange service in numerous distant locations.

* The Commission's Memorandum Opinion and Order released July 30, 1976 (FCC 76-684) would permit such interconnection even though not at the subscriber's premise and even though the subscriber has no need to originate or terminate communications.

** One version of Execunet rejected as not constituting a private line service in F.C.C. Docket No. 20640, supra, is identical to the configuration described in the text above. This version of Execunet was discussed in AT&T's first letter to the Commission wherein AT&T stated:

"MCI's customers may also use Execunet service from a dedicated facility tied to a switchboard or key set." (Letter from James R. Billingsley to Chairman Wiley, dated May 19, 1975, p. 1.)

(cont'd)

47. We believe that the Commission did not intend that the resale and sharing rules promulgated in this proceeding would give rise to duplicative switched public networks and services. The prospect of such pernicious duplication has been specifically eschewed by the Commission, both before* and after** the delineation of issues herein. Thus, there can be no question that the reevaluation of such issues was beyond the intended scope of the instant proceeding, and it certainly was not considered. Yet the effect of the Order, without the suggested clarification and modification, may be to permit parties to attempt to interject this issue into future carrier activities. This should not be permitted to occur.

B. Resale and Sharing of Series 7000 (Video) Private Line Services

48. The Commission's stated objective in the Order is "not to determine whether carriers should change the physical characteristics of their present [Series 7000] offerings" (para.

(cont'd)

MCI's Comments stated unequivocally that Execunet could be provided on a dedicated line basis (Affidavit of Bert C. Roberts, Jr., attached to MCI's Comments, January 16, 1976) and the decision noted that the Execunet "subscriber may secure a separate dedicated local loop for this service." (Decision released July 13, 1976, FCC 76-622, para. 58, no. 9.)

* Specialized Common Carrier Services, 29 F.C.C.2d 870, reconsideration denied, 31 F.C.C.2d 1106 (1971), aff'd sub. nom., Washington Utils. and Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir. 1975) cert. denied, 44 U.S.L.W. 3206 (Oct. 1975).

** Execunet decision, supra.

68). We interpret this to mean that Series 7000 service, which are described in AT&T's tariffs as one-way television transmission service,* may not be multiplexed for non-video use. The Order should be reconsidered for the purpose of clarifying this point so that its meaning is unambiguous in this regard.

49. Our concern is that the Order could be interpreted to have precisely the opposite effect, primarily because it contains language involving two related but factually erroneous assumptions. The first is that since voice grade customers require two-way transmission, they are "unlikely candidates" for the one-way Series 7000 channels. The second is that resale and sharing is "unlikely" because of the "substantial investment" required for multiplexers (para. 68).

50. Both of these assumptions are incorrect. Two-way capability can easily be obtained by ordering two channels, one in each direction. AT&T's preliminary view of cost relationships indicates that, based on current rates for full time Series 7000 channels, a reseller could multiplex the channels for resale at lower rates than other voice grade private line offerings, in locations now served by broadband facilities. However, this language, unless modified, could be interpreted in a manner which permits the sharing of video channels for non-video use -- the antithesis of what the Commission intended.

* AT&T Tariff F.C.C. No. 260, para.: 3.2.6, 3.2.7(A).

51. If AT&T's interpretation is incorrect -- and the order in fact envisions non-video use of Series 7000 -- it must be reconsidered to give all parties an opportunity to consider and introduce evidence on matters of critical concern which were not addressed in the Order and upon which no evidence was requested or submitted. For example, what are the consequences of resale and sharing on the unique nature of the Series 7000 offering; is there a possibility that television transmission will be hindered by the increased demand for Series 7000 channels as a result of the Order; are increased costs and rates for Series 7000 in the public interest; and what are the adverse effects of the Order on innovation? No evidence was submitted on these issues and clearly the requisite hearing has not been held. Surely it would be improper to mandate such far-reaching consequences in the present case.

52. The Series 7000 offering is uniquely designed to meet the specific needs of both full-time and part-time broadcast use: channels are designed specifically to transmit standard monochrome and National Television Systems Committee color signals; switchable interexchange channels, station connections, and local channels are offered to provide flexible television network operations; expedited service order handling and part-time service is provided for improved program flexibility; and studio to transmitter links, monitoring equipment and remote switching are available. These unique features* will be of no benefit for non-television use

* If other than television signals are placed on a Series 7000 interexchange channel, new and costly engineering, operations and maintenance methods must be developed.

of Series 7000. Considerations such as these were not addressed in the instant proceeding.

53. The limited availability of Series 7000 channels was likewise not addressed in the Commission's Order. While there are adequate full-time and part-time facilities to meet currently forecasted requirements of existing television users, there are no surplus full-time facilities and but limited part-time facilities to accommodate any significant increase in demand which may result if non-video use is envisioned by the Order. Since construction of additional Series 7000 channels would require up to two years, during the interim period television and non-television users will be competing for limited channels. As a result, future demand for Series 7000 services for television use may be difficult to meet.

54. If the Order permits non-video use, the cross-elasticities between derived television channels and other private line service offerings will cause shifts from other offerings to resold non-television services derived from the current Series 7000 offering. Any increased cost and decreased revenues from such shifts may result in rate treatment detrimental to video use of Series 7000.

55. The Order could further impede technological innovations. One innovative process currently under investigation, for example, would permit the transmission of two Series 7000

58. The prescription of unlimited resale and sharing of TELPAK is purportedly justified on three grounds. The Commission first states it is "not willing" to assume "in the absence of a more reasoned analysis than AT&T has provided" that the effect of resale and sharing of TELPAK will be to drive the average fill of TELPAK toward the maximum base capacity, increase its cost and lead to its eventual demise (Order, para. 44). The Commission gives no reason for its unwillingness to accept AT&T's analysis and conveniently ignores the total lack of any evidence to contradict it.

59. The Commission's basis for rejection of AT&T's analysis simply defies reason. It is obvious why customers of private line services will shift to shared TELPAK service -- the customer's charges will be lower than they were for individual private line channel offerings.* Even if such shifts were to result in TELPAK sections with the same fill as presently existing TELPAK sections, as the Commission apparently believes, the shifts from individual private line channel offerings would still result in loss of revenue to AT&T.

60. Furthermore, increased fills would surely occur for existing TELPAK sections as present customers seek other users to share and thus to reduce charges to themselves. The interexchange channel rate for each TELPAK base capacity is a flat rate per mile, regardless of the number of channels arranged for use within the base capacity ordered.** Revenue per voice

* AT&T Comments, paras. 31, 37-42, 49-52; Reply Comments, paras. 5-6; Response, paras. 19-20.

** Present TELPAK rates are, of course, based on average use by single customers and not on unlimited shared use.

channel in use would thus decrease. Costs, however, vary depending on the actual number of channels ordered for use by the customer. In other words, the effect of the increased TELPAK fills resulting from customers shifting to shared TELPAK is decreased net revenues to AT&T with no offsetting reductions in costs. If AT&T increases TELPAK rates in an attempt to prevent such losses, the effect may well impact the viability of TELPAK as a competitive alternative to private microwave.

61. The only quantitative evidence of record concerning the adverse effect of the Commission's action was submitted by AT&T. Though summarily "rejected" by the Commission (paras. 59-62), AT&T's evidence is wholly uncontroverted by the record herein. The Commission's first ground for prescribing unlimited TELPAK sharing is thus unsupported by any evidence and must be reconsidered.

62. The Commission next states that even if there is "merit" to AT&T's assertion that unlimited resale or sharing will lead to the demise of TELPAK with diminished contribution to overall common costs of the company, such matters should not be resolved in this proceeding since they are at issue in Docket No. 18128 (Order, para. 43, 44). While we agree "that the appropriate pricing principles for TELPAK will be decided in Docket No. 18128" (Order, para. 43), we fail to comprehend how, pending final resolution of Docket 18128, the Commission can, without explanation, summarily reject the only evidence of record demonstrating the adverse effects of its Order under AT&T's currently effective rates and ratemaking principles.

63. Moreover, the Order perforce affects the character and pricing of the TELPAK offering. Yet the Commission concedes that such matters should be resolved in Docket No. 18128. Assuming arguendo that unlimited TELPAK resale and sharing is neither reconsidered by this Commission nor overturned in Court, it is apparent that whatever tariffs are filed pursuant to this proceeding will have to be substantially altered when the Docket No. 18128 decision is released. AT&T therefore respectfully suggests that, at the very least, the Commission Order directing all common carriers to file revised tariffs by September 15, 1976 (Order released Aug. 4, 1976, FCC 76-746) should be reconsidered and modified to provide for tariffs in this docket to be filed simultaneously with tariffs to be filed in Docket No. 18128.

64. The Commission's third and final reason for requiring the removal of all TELPAK resale and sharing restrictions is that it "expects" the benefits therefrom to outweigh any detriments (Order, paras. 44, 75-38). Nowhere in the Order does the Commission address what specific benefits it expects from unlimited TELPAK sharing, and in fact the record contains not one iota of evidence that any benefits will result -- rather, it supports the contrary conclusion.

65. The Order (para. 44) merely refers to "expected" benefits from resale and sharing of private line services in general and, even as to them, it cites no record support for its

expectations but rather bases them on mere speculation and conjecture.* The Commission not only fails to cite any record support for its "views" and "expectations," it ignores the substantial evidence to the contrary (see paras. 29-37 supra). In reality, what the Commission has built is a doctrine based on conjecture, piled on speculation, mixed with hope and supposition. Reconsideration is clearly required.

D. The Effect Of The Order On The Docket No. 20099 Settlement Agreement

66. The Commission has expressly provided in the Order that it has no intention of abrogating the Settlement Agreement reached by the parties in Docket No. 20099. This clear statement of intention, however, is undermined by the indifferent, confusing and oftentimes careless language of the Order. For example, the Order's frequent misuse of the terms "service" and "facilities", oftentimes apparently treating them interchangeably, ignores the significance of the difference between the two terms and the fact that such distinctions have

* The Order states, for example, that the Commission "expects the using public to benefit from resale and sharing through better management" (Order, para. 77); that it "believe[s] that the reseller will have significantly different, and potentially greater, interests in . . . network management than will . . . the underlying carriers" (Order, para. 78); that "it expect[s] that non-profit intermediaries will provide user groups with better management" (Order, para. 79) and that it is "not persuaded" by AT&T's arguments to the contrary (Order, para. 78). The Commission also "believes" that "additional incentives for research and development" will result and that the two-tiered industry envisioned by the Commission "will not significantly harm" the underlying carriers. In doing so the Order "view[s] as unfounded the contention made by GTE (GTE's Response Comments at 12) that resellers will try to freeze technological developments." (Order, para. 86).

substantial implications.*

67. Simply stated, facilities are furnished to other common carriers (OCC's) by Telephone Companies to enable the OCCs to offer services to their patrons. If the distinction between facilities furnished by telephone companies to OCCs and services provided by telephone companies to customers is intended to be swept aside by the Order herein, serious questions are raised regarding implementation of AT&T's "Facilities for Other Common Carriers" tariffs. By blurring the services and facilities

* See, for example, paras. 4, 9(a), 14-17, 19-23, 36, 40, 84, 86, 95, 118. The use of "facilities" and "services" interchangeably ignores the careful manner in which the Commission and the telecommunications industry developed the particular meanings associated with such terms. During the lengthy proceedings and negotiations in Docket 20099, the carriers worked diligently to establish common understandings regarding "facilities" and "service." These negotiations began October 3, 1974 and continued almost daily for just over five months. Commission directives were carefully analyzed and Bell-OCC positions were reviewed and evaluated. The resulting Settlement Agreement was accepted by the Commission as consistent with Commission policy and the tariffs filed to implement the agreement have been used as the basis for Bell-OCC procedures for over 15 months. A critical feature of this settlement agreement was the provision of facilities by the Bell System to other carriers to enable them to provide service to their customers. Indeed, the tariff filings in response to the settlement are titled "Facilities for Other Common Carriers."

distinctions, the Order may be read to raise such questions as whether facilities should continue to be separately offered and whether resellers and sharers are entitled to OCC facility rates, acceptance of trouble reports, expedited engineering and other features provided to OCCs under facility tariffs.

68. If resale entities are found to be entitled to facilities as well as services, the concepts underlying the present facility tariffs may have to be entirely reevaluated. If, on the other hand, resellers and sharers are found not to be entitled to facilities, they might argue that OCCs have a favorable position vis-a-vis themselves and that OCCs should likewise not be entitled to obtain facilities pursuant to the Settlement Agreement.

69. The Settlement Agreement contemplates filing of revised facility tariffs supported in accordance with the FCC's rules. Studies and cost work are currently in progress looking toward the filing of such revised tariffs. These studies and the cost work could be drastically impacted without reconsideration or clarification as requested herein. Without such ameliorative action, these activities will have to be abandoned or redirected at significant expense and delay.

70. The deficiencies, uncertainties and questions raised above go directly to the very nature of the inter-relationships between the various entities engaged in the

provision of telecommunications. Further proceedings are clearly required to address a matter of such critical importance to the overall public.

E. Reconsideration And Clarification Of Additional Matters

71. The very underpinnings of the Order are so confused and indefinite that an understanding of the ultimate effect of the Order and any sensible efforts to comply therewith are impossible. Unless the meanings of the basic underlying terms upon which the Order is based are clarified, the Order will be subject to whatever interpretation best fits the interpreter's needs.*

72. Many terms essential to understanding the order are ambiguous and undefined -- and then used interchangeably with yet other such terms. For example, the term "customer" is used interchangeably with such terms as "ratepayer," "subscriber," "using public," "end user," "broker," "sharer" and "reseller"; the term "broker" is used interchangeably with "non value added resellers," "intermediary," "middleman," "resale entity," "customer" and "subscriber"; and the term "plant" is used interchangeable with the terms "service" and "facilities". It is unclear, for example, whether the fundamental terms "underlying carrier" and "resale carrier" are applied to a carrier in the totality of its operation or on

* One example of the uncertainties and questions raised by the lack of clarity and cohesiveness of the Order is its misuse of the terms "facilities" and "service" as discussed in paras. 66, 67 above, in relationship to the Settlement Agreement.

an individual service-by-service basis. The term "non-profit" which appears to be fundamental to a determination of the entities common carrier status is subject to a wide range of interpretations. These are a few of the many examples where the Order is so imprecise as to be valueless as any guide to the Commission's true intentions.*

73. The Order herein is admittedly intended to alter drastically the telecommunications industry. Yet, it attempts such action without carefully analyzing and clearly defining the basic building blocks of the industry. As a consequence, none of the established carriers, the specialized carriers or the new carriers the Order seeks to create can know the fundamental parameters within which they are expected to operate. The resulting confusion is bound to adversely affect the carriers, the Commission and, most importantly, the public. The Order in its entirety should be clarified to correct these fundamental deficiencies.

* Paragraphs throughout the Order aptly demonstrate its overall lack of clarity, the impossibility of knowing what it means and the urgent need for clarification. Paragraph 19, for example, discusses underlying carriers, brokers, intermediaries, processors, processing, brokerage, customers, facilities, services, end users and middlemen. The Order either fails to define these terms or does so in an inadequate and unclear manner, fails to explain the interrelationships between and among these terms and entities and leaves in total confusion who owes what obligation or duty to who or what. This paragraph leaves in doubt who (broker, intermediary, underlying carrier or end user) controls utilization of a facility or service, what physical control means or its relevance to resale and sharing. Can the "broker" really "subscribe" to "facilities or services" or does the Order entitle him only to one or the other, and how does the carrier know what to provide. Is the broker the "intermediary," or is yet another entity envisioned. The unanswered questions go on and on with the result that this paragraph -- and numerous others throughout the Order -- is beyond comprehension.

74. Moreover, as discussed in Subpart C (paras. 62-63), when the Commission's Decision in Docket No. 18128 is released, it may substantially affect both the rate level and structure of the tariffs which are to be filed in this matter.

75. Finally,* a single paragraph in the Order (para. 118), addresses the complex and important issue of "maximum separation" of functions via the formation of a corporate subsidiary.** The "maximum separation" principle holds that a carrier's data communications and data processing (including hybrid data processing) activities should be performed by a separate corporation in order to prevent inter alia its communications revenues from cross-subsidizing its

* It should also be noted that a Petition for Review has been filed by I.T.T. World Communications, Inc., with the United States Court of Appeals for the Second Circuit. AT&T also provides international MTS and private line services under the Commission's authority and believes the Order herein should be reconsidered and clarified as to the provision of international services.

** AT&T interprets the Order to be inapplicable to its provision of private line and monopoly services even though AT&T leases satellite facilities from Comsat and Comsat General to provide such services. To the extent that this interpretation is incorrect, reconsideration and clarification is necessary. In addition, AT&T does not waive any right to question the Commission's authority under the Communications Act and applicable law to require common carriers subject to the Act to form separate corporate subsidiaries.

data processing activities. Considering this matter sua sponte herein, the Order provides for a case-by-case waiver of the "maximum separations" principle for data processing activities of carriers that do not provide monopoly services. This issue was not raised in the Notice nor addressed by any party in the proceeding. The Order thus is legally insufficient. AT&T respectfully submits that, insofar as this determination affects Commission's Rules (Section 64.702) promulgated pursuant to the Computer Inquiry (Docket No. 16979), such matters are more properly considered in the new Computer Inquiry, F.C.C. Docket No. 20828 (Notice of Inquiry and Proposed Rule Making, FCC 76-745).

CONCLUSIONS

The effect of the Order will be to dramatically alter the structure and nature of the telecommunications industry. It will drastically change the duties and responsibilities that have traditionally attached to the provision of services by common carriers directly to ultimate users and interject third parties into the carrier-customer relationship. This fundamental change is being ordered on the basis of a wholly insufficient record and without adequate opportunity for the parties or the Commission to fully analyze, evaluate or even understand its sweeping consequences. For the reasons discussed herein,

AT&T respectfully requests that the Commission reconsider its Order herein. As a first step AT&T requests that a conference be convened, as discussed in the first paragraph of the body hereof.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

August 25, 1976

PETITION FOR RECONSIDERATION
AND CLARIFICATION

Telenet Communications Corporation, by its attorneys, hereby requests that the Commission reconsider and clarify its Report and Order adopted July 1, 1976 in the above-captioned proceeding. In support thereof, Telenet states as follows.

I. Preliminary Statement

The Commission's July 1, 1976 Report and Order (hereinafter "Order") represents the Commission's initial effort to formulate broad policies respecting resale and sharing of communications services and facilities, and thus must be viewed as a seminal document on the subject. Whereas in the past, the Commission has treated these subjects on an ad hoc basis, as particular complaints about specific tariffs were brought to its attention, the Commission has now ruled, on an industry-wide basis, that:

(1) "Resale" is a permissible activity, so long as the reseller is regulated as a common carrier;

(2) "Sharing" is a permissible activity, so long as it is conducted on a non-profit basis; and

(3) Existing tariff provisions limiting or prohibiting the resale or sharing of communications services and facilities are unreasonable, discriminatory, and unlawful.

Telenet is in fundamental agreement with the first two of the foregoing general statements of policy, though for the reasons detailed below, it views with concern the extent to which the Commission appears to have stretched its definition of "non-profit" sharing; and it is concerned with several aspects of the Commission's proposed regulatory treatment of "resale" carriers. However, Telenet believes that the across-the-board holding as to the illegality of all restrictions on sharing and resale as to non-monopoly services of all carriers (if, in fact, that is the Commission's holding) is impermissibly broad and unsupported by the record.

As to "sharing", Telenet submits that the Commission's Order is internally inconsistent: On the one hand, it enunciates the commendable policy that sharing is strictly a "non-profit" activity; yet, on the other hand, the Order expressly authorizes the creation of so-called sharing arrangements under which entities other than the sharing users are to be permitted to earn a profit -- a situation virtually indistinguishable from "resale".

With regard to the question of the form of regulation of resale carriers, such as Telenet, our concern is twofold:

(1) The Order appears to have engaged in revisionism as to the intent of the rules adopted as a result of the Computer Inquiry, 28 FCC2d 267 (1971), without notice and opportunity for comment on the merits of such change, and without record support therefor; and

(2) The Order fails to give adequate consideration to proposals by Telenet and others for a simplified procedure of certification as an alternative to the detailed line-by-line certification procedures currently followed.

The first of these points will be addressed in more detail below. The second -- involving the certification procedures applicable to resale carriers -- appears to be of fairly narrow significance in the context of this proceeding, and Telenet will forego further argument on it in this proceeding, without prejudice to its right to seek future relief, by rule-making or otherwise, from a cumbersome procedure which appears to serve no regulatory purpose.^{1/}

^{1/} The Commission apparently rejects Telenet's suggested simplification of the certification procedure as not "consistent with present practice" (paragraph 110). This begs the question, and ignores the invitation contained in Paragraph 28 of the Notice of Inquiry to examine this subject "without regard to the actual limits of our present jurisdiction".

II. Neither the Record Nor Reasoned Analysis Supports a Ruling That ALL Non-Monopoly Services of ALL Carriers Are Subject to Unlimited Resale and Sharing

At the outset, it is not clear from the Commission's Order that the Commission intended its ruling as to the propriety of resale and sharing restrictions to be as sweeping as might, at first blush, appear. At paragraph 27 of its Order, the Commission introduces the issue of the lawfulness of tariff restrictions on resale and sharing in the following terms:

"These tariff provisions restricting resale and sharing of common carrier services and facilities are found in virtually all tariffs filed by underlying carriers, although there is some variation in the degree to which individual carriers restrict resale and sharing . . . Although subsequent discussion will primarily focus on AT&T's tariff restrictions, we will reach conclusions of law applicable to tariff restrictions imposed by all underlying carriers. Because AT&T is the principal supplier of communications services and facilities, its tariff language is often adopted by other underlying carriers. For this reason, we believe that reference to AT&T's tariffs will prove adequate for an analysis of the lawfulness of all carrier tariffs restricting resale and sharing." (Emphasis added:UA —).

427 >> The implication of the foregoing appears to be that when the Commission refers to "all carriers", it really means "all underlying carriers"; i.e., those carriers which own a substantial portion of their own transmission facilities. The inclusion of the specialized and domestic satellite carriers in Paragraph 70 of the Order is not inconsistent with this interpretation, since for the most part such carriers also own a substantial portion of their transmission facilities. Accordingly, the

Commission should take the opportunity afforded by the filing of requests for reconsideration to make clear that its ruling is limited to the "underlying carriers", and not to the resale carriers.

The Commission should also make it clear that its ruling as to the unlawfulness of resale and sharing restrictions is limited to private line offerings as distinguished from switched services. This intent appears from paragraph 6 ("We accordingly find unlimited resale and sharing of private line services . . . to be just and reasonable"), when read together with paragraph 55 ("Moreover, both MTS and WATS are switched services, with characteristics distinct from those of private line service, . . ."). Although in summarizing its action the Commission appears to equate "private line services" with "all services other than monopoly services" (Paragraph 130), it is not believed that this is either an accurate equation of the services involved or a correct characterization of the detailed discussion and analysis previously set forth in the Order.

The record compiled in this proceeding contains neither facts nor argument directed to questions of the reasonableness of any "resale" carriers' tariffs, and accordingly, there exists no record support for any sweeping conclusion as to the unreasonableness of such tariffs. The record is similarly devoid of any evidence or arguments dealing with the sharing or resale of switched services. Moreover, the Commission's Order does not contain any reasoned analysis which would support the specific application of the "unlimited resale and sharing"

requirement to the services of "resale" carriers, or to switched services of carriers generally. The Commission's discussion at paragraphs 75 - 88 concerning the "public benefits of resale and sharing" deals entirely with the resale and sharing of the private line services and facilities of the "underlying carriers", and foresees "the development of a two-tiered" (not a three-tiered or multi-tiered) market structure.

For the foregoing reasons, then, it is urged that the Commission clarify the scope of its ruling concerning the unlawfulness of resale and sharing restrictions to make clear that it does not extend to switched services or to "resale" carriers.

III. The Commission's 1971 Computer Decision
And Section 64.702 Of the Rules,
Adopted Therein, Were Expressly Appli-
cable To All Common Carriers -- Not
Just "Monopoly" Carriers

At paragraph 118 of the July 1 Report and Order, without prior notice, the Commission engages in a belated reconsideration of the "maximum separation" policies contained in its 1971 Computer Inquiry Decision, and concludes -- on the basis of a mischaracterization of Telenet's comments filed in this proceeding, coupled with an unsupported premise advanced by no party to the proceeding -- that

"The purpose of the Rule [64.702] is to insure that no cross-subsidization exists between a carrier's monopoly services and its data processing services." (Emphasis added)

As its spring board for this revisionism, the Commission states:

"In its comments, Telenet urges that we make applicable this principle [of maximum separation] to resale carriers"

The implication that the principle was not already applicable to resale carriers, and that Telenet was urging its extension to such carriers, finds no support either in the Computer Inquiry or in Telenet's comments. Telenet had referred to the Computer Inquiry and the "maximum separation" principle in connection with a discussion of the activities of Tymshare, Inc., a major data processing and data communications enterprise which had not at that time submitted itself to the Commission's regulatory jurisdiction, and was offering both communications and data processing through a single corporate entity.^{2/} At paragraph 52 of its Comments, Telenet noted that:

"Tymshare's data processing activity . . . makes extensive use of the same network communications service used by its data communications customers, some of which are competitors of Tymshare in the data processing field . . ."

Telenet urged that merely because Tymshare was itself a large user of the communications service which it was offering to others constituted "no reason for exempting the firm" from the provisions of the Act or the Commission's Rules and Policies, but that:

"The protections against discrimination and preferential treatment afforded by compliance with the requirements of the Act (and the Commission's 'maximum separation' rules developed in the Computer Inquiry) are even more necessary." (Footnotes omitted).

^{2/} On May 13, 1976, Tymnet, Inc., a newly-created corporate subsidiary of Tymshare, Inc., filed an application for authorization, pursuant to Section 214 of the Communications Act, to offer, as a carrier, the communications services which are currently being provided in an unregulated mode by Tymshare, Inc.

Thus, Telenet was not suggesting an extension of the maximum separation policy to a new class of carriers: It was assuming that when the Commission stated that the policy was applicable to "all carriers", it meant all carriers; Telenet was merely demonstrating factually why Tymshare's unregulated mode of providing communications services was not only contrary to the Act but in frustration of the principles enunciated in the Computer Inquiry.

In the Commission's April 3, 1970 "Tentative Decision" in the Computer Inquiry, 23 FCC2d 291, the types of problems which it foresaw might arise from the provision of data processing services by common carriers were discussed at some length. Thus, at paragraph 33 (28 FCC2d, at 301), the Commission stated:

"The dangers identified by respondents and by the SRI study relate primarily to the alleged ability of common carriers to favor their own data processing activities by discriminatory services, cross-subsidization, improper pricing of common carrier services, and related anti-competitive practices and activities. We recognize that these dangers may be real and could have substantial adverse effects on non-carrier data processing companies. We are confident, however, that the steps we are taking herein will provide adequate protection against possible abuses."

Nowhere in either the Tentative Decision or the Final Decision (23 FCC2d 267) does the Commission suggest that such "dangers" and "possible abuses" are limited to the provision of data processing services by a monopoly carrier. In fact, each of the identified problems could as likely arise were a non-monopoly carrier to be offering a data processing service through the same corporate entity, using common facilities and personnel

for both the regulated and unregulated offerings. Thus, the Commission announced in its Tentative Decision that:

"We are hereby adopting a policy that communications common carriers shall furnish data processing services only through separate corporate entities. This requirement shall be applicable to all communications common carriers engaged in interstate or foreign communications services, including connecting carriers . . . , where any such carrier itself has annual operating revenues exceeding \$1,000,000 or any such carrier is directly or indirectly controlled by or is under common control with another carrier or carriers and the combined annual operating revenues of all such carriers exceed \$1,000,000." (28 FCC2d at 302, emphasis added.)

With slight modifications, not relevant to this discussion, the Commission in its Final Decision and Order of March 1971, adopted the "maximum separation" policy proposed in the Tentative Decision, stating:

"We consider the concept of 'maximum separation' central to our regulatory scheme, and shall require such separation to insure that the public is offered efficient and economical communications services." (28 FCC2d at 270, emphasis added.)

One of the specific examples of potential discrimination flowing from a combined offering of data processing and communications which was alluded to in the Computer Inquiry was the complaint of Bunker-Ramo against Western Union, alleging that the latter had discriminated in favor of its own SICOM service and against Bunker-Ramo in the provision of communications services and equipment. Such communications services (private line services of Western Union, with which AT&T and other carriers compete) were obviously not of a "monopoly" character, and yet the potential for discrimination was expressly recognized by the Commission.

Moreover, the Commission was well aware that the communications industry at the time the Computer Inquiry was adopted included both specialized and monopoly carriers. As expressly noted in the Tentative Decision (28 FCC2d, at 293), the Commission in 1969 had authorized "a new carrier, Microwave Communications, Inc., ... to enter the field of intercity long distance service between Chicago and St. Louis for the purpose, among others, of providing the public a wider range of voice and data transmission services" and other proposals for specialized, competitive, communications services were then pending before the Commission. The commenting parties in the Computer Inquiry included MCI, Data Transmission Company (DATRAN), Nebraska Consolidated Communications Company, and Southern Pacific Communications Company -- each of which was or was seeking to become a specialized common carrier.

That paragraph 118's characterization of the purpose and scope of Section 64.702 of the Rules is an aberration is further confirmed by the Commission's Notice of Inquiry and Proposed Rule Making in Docket No. 20828, released August 9, 1976, where the Commission proposes to amend Section 64.702 of the Rules to redefine "data processing". The Commission specifically proposes to continue to require that data processing services (as ultimately defined) "not be offered by carriers except under the maximum separation conditions of Section 64.702"; Notice, paragraph 20; see, also, paragraphs 3, 5, 12, 15, 16, and 22, and Footnotes 6 and 9. Nowhere in the Notice does the word "monopoly" even appear: Rather, the clear implication throughout

the Notice is that the maximum separation rule applies to all carriers under the Commission's jurisdiction whose annual revenues exceed the amount specified in the rule. Thus, in paragraph 12 of the Notice, the maximum separation rule is described as applicable to "any carrier . . ." (Emphasis added).

The Commission states its belief in paragraph 113 that "a resale carrier providing the services which we reasonably anticipate . . . may not be able to do so consistent with the requirement of separate corporations". No reason or citation is given for this belief, which represents a position not advanced by any party commenting herein. In fact, as noted above (Footnote 1), the prime example of an integrated data processing and data communications company -- Tymshare, Inc. -- has formed a separate entity -- Tymnet, Inc. -- to provide its communications services.^{3/}

While the Commission's expressed policy of considering requests for waiver of Section 64.702 "on a case-by-case basis"

^{3/} In "Comments" filed with respect to that application, Telenet pointed out that Tymnet has failed to demonstrate that in fact it is, or will be, separate from Tymshare, Inc., in that it has failed to identify the officers and directors of Tymnet, Inc., and has failed to address itself to the questions of whether and to what extent it will maintain separate marketing and administrative staffs. Tymnet has not responded thereto, but its silence cannot be construed as evidence that it may not be able to provide its communications services in compliance with the policies enunciated in the Computer Inquiry.

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as stated in paragraph 118 is consistent with sound legal principles,^{4/} Telenet strongly excepts to its apparent willingness to grant such waivers, announced in advance on the basis only of an unsupported belief in the difficulty of achieving maximum separation, coupled with an erroneous interpretation of the Computer Inquiry Decision and the reasons underlying its adoption of the maximum separation policy.

If, despite the foregoing, the Commission adheres to the post hoc limitation of the Rule's applicability to "monopoly services", it will then be necessary for the Commission to define "monopoly" and "monopoly services". Neither the Communications Act nor the Commission's Rules define these terms, and technological developments suggest that yesterday's "natural monopoly" may be tomorrow's competitive arena.

In summary, it is submitted that paragraph 118 represents an erroneous characterization of an established rule and policy, based upon misunderstood arguments and a baseless assumption, and should be reconsidered and modified.

^{4/} See WAIT Radio v. FCC, 418 F2d 1153 (U.S. App. D.C., 1969).

IV. The Permissible Forms of
Sharing Described in Para-
graph 129(c) Invite
Unregulated Resale for Profit.

In Paragraph 23 of its Report and Order, the Commission defines sharing as

"a non-profit arrangement in which several users, perhaps having no community of interest other than to communicate between the same two geographic points or to communicate with each other, collectively use communication services and facilities obtained from an underlying carrier or resale carrier, with each user paying the communications-related costs associated with subscription to and collective use of the communications services and facilities according to its pro rata usage of such communications services and facilities." (emphasis added).

However, in Paragraph 129, the Commission states that

"three forms of sharing may reasonably be anticipated as a result of our decision:

(a) Sharing through a non-profit intermediary;

(b) 'Pure' sharing wherein two or more users combine their needs to share only the costs of communications line service; and

(c) Sharing, either through a for-profit intermediary or in an arrangement wherein one user is the primary user, in which line costs and charges associated with 'augmented' services are shared according to usage. In this case, no management fee may be charged unless the payment is made to an entity other than a sharing participant."

Thus, under (c), a "for-profit" intermediary may lease facilities or services from a carrier, on behalf of a group

of sharing users, "augment" those facilities or services, and charge the sharing users (1) an apportioned share of the costs of the communications and the augmentation thereof, plus (2) a management fee, since the intermediary is not a "sharing participant".^{5/} It is impossible to distinguish such an arrangement from "resale", which the Commission has defined as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public (with or without 'adding value') for profit."

(Paragraph 17.)

Elsewhere (paragraph 122), the Commission acknowledges its anticipation that "sharing will be more widely characterized by an individual or a for-profit corporation taking the lead role (either as an intermediary responsible for paying the carrier the entire tariff charge or as a primary user of the service), and providing the other users with other services augmenting the communications service." Despite its recognition that such an arrangement permits "a

^{5/} While this appears to be the clear meaning of the quoted subparagraph, it is conceivable that the Commission did not intend to permit the "for-profit" intermediary to charge a management fee, but only to permit such a fee to be charged by yet a third type of entity -- neither a sharing user nor the "intermediary". Such an interpretation would not affect the conclusion that the Commission has effectively approved the concept of "sharing-for-profit", since diverting profits from one entity to another does not thereby render the enterprise yielding the profit a "non-profit" activity.

number of possible abuses" (Ibid), the Commission rejects any and all suggestions that it adopt procedures designed to minimize such abuses.

Among the suggestions which had been made to the Commission were that it

(a) limit the number of entities which might join in a single sharing arrangement, either absolutely or through the imposition of reporting requirements on large multi-user sharing arrangements;

(b) preclude any charge by one sharing party to other sharing parties for augmentation of the basic communications services or for management fees; and

(c) impose periodic reporting requirements as to sharing arrangements.

Aside from precluding the charge of a "management fee" by one of the "sharing participants," unless it were a "non-profit intermediary," the Commission rejected each of these suggestions with little or no discussion. Moreover, while the Commission holds that it would be inconsistent with non-profit sharing for a network management fee to be charged by one sharing entity to the other users, it would permit "network management to be provided by an outside entity, so long as no sharer obtains a profit therefrom" (paragraph 124, emphasis added). To permit the outside entity to realize a profit for his unregulated "network management" would be a clear invitation to the abuses recognized in paragraph 122 of the Order

just as would the realization of such profit by one of the sharing participants themselves.

The logic upon which the Commission bases its sharing criteria is defective in several respects. First, merely because the "intermediary" is a "non-profit" corporation is no reason to assume that profit on the sharing arrangement is not being realized. Many "non-profit" corporations undertake commercial activities producing operating income ("profits") which is distributed to the managers (in the form of salaries); to the founders of the enterprise (in the form of interest on loans); and, perhaps, to worthy charities.^{6/} To assume that a "non-profit" entity lacks a profit motive is to ignore economic reality. Any enterprise requires capital, and whether capital is invested in the form of dividend-earning equity or interest-earning loans is immaterial to the need of the enterprise to realize operating "profits" to meet the cost of such capital. Also, the entity may well seek a profit on certain of its activities in order to generate funds with which to subsidize other activities. Thus, to conclude that a "non-profit intermediary" represents any barrier to the realization of profit in the "sharing" of communications services or facilities is just simplistic.

^{6/} Several licensees of commercial broadcast stations are "non-profit" corporations. Among these are Loyola University (WWL(AM), -FM, and -TV, New Orleans); Christian Broadcasting Network, Inc. (WYAH-TV, Norfolk, VA., and others); and The City of Jacksonville, Florida (WJAX(AM) and -FM).

Secondly, to permit an unregulated entity to realize an unsupervised fee for augmentation and management services, even where it is a for-profit intermediary or some other entity not participating directly in the sharing arrangement is to invite the very abuses which the Commission concedes to be "possible". The real effect of paragraph 129(c) is to define common carrier activities not in terms of the activities themselves but in terms of the structure of the offeror. The difference between a resale broker (a carrier, as defined in paragraph 19), and a for-profit intermediary charging or contracting separately for "management" services, is semantic, not substantive. The services offered to the end user may be identical; the cost may be the same; and the potential for profit is equal; but the broker is regulated while the "intermediary" is not.

As an illustration of the mere semantic difference between unregulated "sharing" and regulated "resale", which the Commission has created, consider the activities of Telenet itself. Telenet offers its communications service to the public, for hire, and seeks to make a profit on such offering. Clearly, the Commission intended to continue to subject Telenet to regulation as a common carrier. Yet, under the terms of paragraph 129(c), Telenet could apparently avoid such carrier status by either of two simple expedients:

- (a) One of Telenet's customers could lease, from an underlying carrier, all of the commonly-used lines in Telenet's network, and could "share" such lines with the other Telenet customers. Telenet would thus be left as merely a "for-profit intermediary" providing "augmentation" and "management" service (operation of the network's packet-switching equipment, marketing, accounting, and so forth), and would be free to earn a profit on same.
- (b) Telenet could continue to obtain the network lines in its own name and assign to its customers the use of such lines, transferring to a parent, subsidiary, or affiliated corporation the "network management" component(s) of its overall service activity (whatever such component(s) may be, since they are not defined in the Commission's Order). Telenet could thus operate on a "not-for-profit" basis and the other corporation could charge an unregulated "management fee."

Because of the far-reaching nature of the Commission's decision, it is difficult to predict with certainty the potential mischief which may result, but one thing is clear: Profit-oriented brokerage-type entities are not going to submit voluntarily to Commission certification and tariff oversight

if comparable profits are available through cosmetic restructuring. The Commission's recognition (footnote 90) that "competition will be primarily among the resale carriers", though correct in its context, overlooks the competition between unregulated intermediaries, on the one hand, and the regulated specialized and resale carriers, on the other, and the likely effect on the latter of a body of unregulated intermediaries with the capability to change rates ("management fees") at will to undercut carriers who are bound to their published rates until changed through a time-consuming and expensive process.

V. Conclusion.

The Commission's July 1 Report and Order represents a significant contribution to the development of regulatory policies designed to keep pace with technological developments. However, as might be expected in an undertaking of such magnitude, the Order suffers from seeming inconsistencies and ambiguities, and in some cases goes beyond the scope of the Notice of Inquiry and the record developed herein.

Accordingly, it is urged that the Commission reconsider, and clarify, its Order in the particulars set forth above.

Respectfully submitted,

TELENET COMMUNICATIONS CORPORATION

August 25, 1976

PETITION FOR RECONSIDERATION

Aeronautical Radio, Inc. (ARINC), and the Air Transport Association of America (ATA), by their attorneys, pursuant to Section 405 of the Communications Act of 1934 and Section 1.429 of the Commission's Rules, hereby petition the Commission to reconsider its Report and Order in this proceeding, 41 Fed. Reg. 30657 (1976), and delete Appendix E and related holdings on single customer tariff provisions.

I. PRELIMINARY STATEMENT

In its Report and Order, the Commission: (1) swept aside restrictions in communications common carrier tariffs against sharing and resale of private line services; (2) adopted principles to govern the manner in which such services may be shared and resold; and (3) in an appendix, ruled that "single customer" provisions in AT&T's and Western Union's

private line tariffs* which recognize ARINC's long-established right to be a customer for those services were unlawful.

This petition is addressed particularly to the fundamentally erroneous ruling on the single customer provisions, which ruling, moreover, is wholly unnecessary in view of the basic holdings of the Report and Order. First, however, this petition indicates briefly ARINC's and ATA's position on other aspects of the Report and Order, without formally seeking reconsideration of them.

II. PRESCRIPTION OF UNLIMITED SHARING AND RESALE

ARINC and ATA in their concluding submission to the Commission in this proceeding, urged that the role of not-for-profit industry-oriented intermediaries should be "viewed affirmatively," but cautioned the Commission that "unlimited arbitrage" should be scrutinized closely with "a careful balancing of the interests of the carriers, the users and the public generally" Specifically, we urged that carriers should not, by a rigid prescription of unlimited arbitrage, be made unable to price their services "in response to both costs and market conditions" Thus, ARINC and ATA concluded that the Commission should continue to

* AT&T Tariff F.C.C. No. 260 ¶2.2.1(G); Western Union Tariff F.C.C. No. 254 ¶2.2.1(G).

place its primary reliance on "the forces of the marketplace" to govern the degree of arbitrage which will be permitted. (Response of ARINC and ATA, ¶¶51, 11, 49).

The Commission has now chosen, however, to exercise regulatory power by mandating unlimited arbitrage not only with respect to single channel private line services but also for bulk offerings, including Telpak.

Because Telpak constitutes a carrier response to particular market conditions, we can only hope that the sweeping changes made by the Report and Order will not destroy Telpak as a viable and essential competitive bulk service offering and one which has enabled the air transport industry to centralize reservations, administrative, and dispatching functions for improved public service and to provide more efficient flight operations.

The present action inevitably recalls the Commission's prescription of unlimited sharing in the Telpak Sharing case* and the appellate court's observation that, "In effect, then, the Commission rested its prescription [of unlimited sharing] on the finding that the basic Telpak rate structure was unlawful. Such action was impermissible."** The Court explained that the record justified no such finding and that, "Moreover, the assumption that Telpak itself, without any sharing, is unlawfully discriminatory flies in the face of the

* 23 F.C.C.2d 606, 26 F.C.C.2d 862 (1970), rev'd, American Tel. & Tel. Co. v. FCC, 449 F.2d 439 (2d Cir. 1971).

** 449 F.2d at 452.

prior Commission decision upholding the competitive justification for Telpak C and D [in the original Telpak case]."

In this Report and Order, however, the Commission seems to have disavowed any intent to alter or eliminate Telpak saying "we do not accept the contention that removal of the restrictions necessarily requires any substantial repricing of Telpak" (§48). Further, the Commission stated that "we find that there is no convincing evidence that either unlimited sharing or resale of Telpak will increase its cost to the point that it is no longer attractive" (§49).

While we certainly agree with the Commission that there is no justification for any increase in Telpak rates, we remain concerned by the carriers' submissions in this proceeding which threaten rate increases for Telpak, or even its elimination, due to unlimited resale and sharing.

In sum, ARINC and ATA believe that substantial unresolved questions of law and fact remain inherent in the Commission's prescription of unlimited sharing and resale, but we will defer further comment on this aspect of the Commission's decision until we have had an opportunity to review petitions or comments concurrently being filed by other parties.

III. REGULATION OF SHARING AND RESALE

Taking as a given the Commission's prescription of

* Id.

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unlimited sharing and resale, ARINC and ATA are in general agreement with the portions of its Report and Order which deal with the regulatory treatment of sharing and resale.

The Commission was especially wise, we feel, not to impose various seemingly "minor" procedural requirements on the many sharing* arrangements which it encourages. What may seem a reasonable restriction or procedure from a regulator's desk can become a cost burden and a practical discouragement to a user.

In a decision of this kind, questions of Commission intent and interpretation are bound to arise, but ARINC and ATA at this juncture perceive nothing in the Commission's intent or language to inhibit or restrict the present method employed by ARINC to serve its industry. We shall, of course, review closely the interpretations placed on, or requested changes in, the Commission's language by carriers or other users in the course of this proceeding and will submit responses thereto as may be appropriate.

* We use the term "sharing" in the sense promulgated by the Report and Order at ¶¶23 and 25, namely a "non-profit arrangement" for "collective use" of services and facilities, which is a broader concept than some definitions of "sharing" or "joint use," and which includes "sharing" through an "intermediary" customer entity.

IV. "SINGLE CUSTOMER" PROVISIONS

For many years ARINC's status as a customer of common carrier service has been recognized by the FCC as necessary to meet the communications requirements of the air transport industry. Aeronautical Radio, Inc. v. American Tel. & Tel. Co., 4 F.C.C. 155 (1937). The "single customer" tariff provisions constitute the carriers' response to their legal duty to serve ARINC. Yet, the Report and Order concludes in Appendix E, on inquiry items 9 and 10 as to the lawfulness of the single customer provisions, that they are unlawfully discriminatory.

At the same time, the overall conclusions of the Report and Order endorse ARINC's operational concept and its right to service. Indeed, the Commission prescribes broadly that other "intermediaries" shall be able to order service. Thus, the discussion in Appendix E is essentially moot. Moreover, as shown below, the conclusions in Appendix E are based on an erroneous confusion between the applicable legal principles mandating ARINC's status, on the one hand, and a factually incorrect and procedurally inadequate attempt to decide rate structure issues, on the other.

A. Mootness of Appendix E

Despite ARINC's and ATA's misgivings about the impact of unlimited resale and sharing on the carriers' ability to structure their tariffs to meet competitive needs in the marketplace, we recognize that the Commission's overall approach is consistent with its desire to increase the options

available to users from resale entities such as value added carriers and to enhance the flexibility with which users can make arrangements for their communication needs through various forms of collective use.

The Report and Order's treatment of sharing through a non-profit intermediary, recognizing both the needs of many industries for coordinated communications and the inhibiting effect of regulatory or reporting burdens, may provide a creative solution to the emerging requirements of many industry groups, and will permit the continuation of already existing arrangements, such as those made by ARINC for the air transport industry.

Yet, in regard to tariff provisions now in effect* to permit service to users with developed needs for coordinated communications through an intermediary, the Commission recites in its "Conclusions," that, "we have concluded that the so-called 'single customer' provisions found in the carriers' tariffs are unjustly and unreasonably discriminatory, and accordingly unlawful" (§130). Strangely, there are only two other brief references to the legality of the "single customer" provisions in the entire basic text of the Report and Order (§§47, 125). Indeed, in the four-page "SUMMARY OF DECISION" the Commission's action with respect to the "single customer" clauses is not mentioned (§§3-9a). The entire discussion of "single customer"

* AT&T Tariff F.C.C. No. 260 §§2.2.1(C)-(J); Western Union Tariff F.C.C. No. 254 §§2.2.1(D)-(G).

clauses is attached to the Report and Order in the 14-page Appendix E.

We make this observation that the "single customer" issue was not treated as an integral part of the basic decision text, because it is indicative of a matter of substance: the Commission's action on the single customer clauses was not an integral part of, or necessary to, its basic decision. Indeed, the basic decision actually endorses sharing through non-profit intermediaries, which Appendix E recognizes as the equivalent to operation under the single customer tariff provisions (App. E, ¶2). In Appendix E it is even acknowledged that the basic decision extending sharing to all customers rendered moot the question of the lawfulness of the single customer status of governmental entities (App. E, ¶16).

Because, under the basic decision, ARINC will be able to serve the air transport industry as before, the discussion of ARINC's single customer status in Appendix E is equally "moot," and for this reason alone, it should be deleted. Further, as shown below, the unnecessary arguments and conclusions in Appendix E are legally invalid.

B. Legal Infirmities of Appendix E

In contrast with the generally logical development of the Report and Order's basic holding, which focuses on the

showings made in this proceeding regarding the possible benefits and harms of expanded resale and sharing and the applicable legal requirements, the rationale of Appendix E is difficult to fathom. It appears, however, to involve a discussion of three separate points: (1) the relevance of the Commission's 1937 decision in ARINC v. AT&T, supra, holding that ARINC should be regarded as a single customer for AT&T's private line teletypewriter service, but need not be accorded preferential press rates; (2) ARINC's entitlement to service under §201(a) of the Communications Act; and (3) the competitive necessity justification for ARINC's single customer status.

Each of the above will be addressed in turn.

1. The "Preferential Rate" Issue

The Appendix observes that the Commission held in ARINC v. AT&T, supra, that the needs of the air transport industry were "adequately effectuated by requiring that AT&T treat ARINC as a single customer . . .", but that those needs did not require AT&T to give "preferential rate treatment" (App. E, ¶12). The Appendix reaches that conclusion because in the 1937 case, the Commission, though confirming ARINC's single customer status, refused to establish a special rate similar to the then-existing "press rate" (App. E, ¶15).

Paragraph 5 of the Appendix continues with the mystifying statement that "[i]n short [in 1937], we found

ARINC's request for private line teletypewriter service at press rates to be 'unreasonable' under Section 201(a) because it would be 'unjustly or unreasonably' discriminatory under Section 202(a)." However, we simply cannot find such a finding or suggestion in that case. The totality of the Commission's holding on ARINC's request for the same rates as the press rate, was that a "like service" was not involved and, therefore, AT&T's refusal to give ARINC a rate comparable to the press was not "discriminatory" against ARINC (4 F.C.C. at 167). There was no suggestion that it would be unlawful if ARINC employed existing tariffs in an economical manner.

2. ARINC's Entitlement Under §201(a)

The discussion in Appendix E (¶4) does not appear to dispute that ARINC is entitled to service under §201(a) of the Communications Act and, indeed, the Report and Order's holding that non-profit intermediaries are entitled to service subsumes ARINC's right to service. Yet, Appendix E seems to conclude in ¶5, that a carrier can violate §202(a), which prohibits discrimination, by obeying its duty to serve under §201(a).

This absurd interpretation of the Communications Act appears to flow from Appendix E's mistaken focus on rates, rather than on the legitimate and recognized need for ARINC's single customer status independent of the carriers' rate

structure. Thus, Appendix E actually represents an improper attack on Telpak rates* -- inconsistent with the neutrality of the body of the Report and Order -- in effect holding that it is discriminatory for a carrier to meet its legal obligation to serve ARINC because of the existence of the Telpak tariff. Obviously, however, the lawfulness of Telpak rates or any other rates are not at issue in this proceeding,** and purported conclusions about customer status which are really conclusions about rates cannot stand.

3. The Competitive Necessity Justification

A substantial portion of Appendix E (§§6-9) is devoted to a discussion of whether competitive necessity justifies ARINC's recognition as a single customer. However, the Appendix largely ignores the unique needs of the air transport industry and ARINC's special role as an operator of existing microwave systems, which bear on the appropriateness of ARINC's single customer status, and, instead, jumps to consideration of what is deemed "discriminatory rate treatment" (§6).

Even taking at face value Appendix E's "analysis" of competitive necessity, it is so obviously unfair and prejudiced

* Cf. *American Tel. & Tel. Co. v. F.C.C.*, supra, 449 F.2d at 452.

** *Shared Use and Resale*, 48 F.C.C.2d 1077 (1974).

as to be of no decisional significance. Thus, Appendix E regards as key the question of whether the air transport industry will shift to private microwave if ARINC loses its single customer status* (App. E, ¶7). To answer this question, the Appendix considers the lack of certain items of evidence to be critical (App. E, ¶8). But, on examination, each item clearly is one which cannot be expected to be shown under present circumstances where ARINC in fact has single customer status.

No "deficiency" of proof alleged in the Appendix has any relevance to the underlying issue of competitive necessity and, hence, the conclusions of the Appendix drawn from these asserted deficiencies have no legal basis.

The Appendix asserts ARINC did not show that

"(a) its board of directors has authorized the construction of a nationwide private microwave system."

However, the ARINC Board has endorsed private microwave, but has no need to proceed with construction of a nationwide system prior to the loss of adequate service.

* That Appendix E is a futile exercise, in view of the holdings in the basic decision, is highlighted by this portion of the discussion. Under the Commission's decision, ARINC will continue to serve its industry as a non-profit intermediary. Thus, there is no question of a shift to private microwave simply because of a change in "status."

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The Appendix asserts ARINC did not show that

"(b) it has a contractual commitment from any financial institution to supply it funds at specific terms for the construction of a private microwave system.

Yet, the record shows that ARINC has had positive negotiations with financial institutions which indicate that the necessary capital is available at reasonable rates of interest, and a "contractual commitment . . . at specific terms" would hardly have been appropriate for the reasons just stated above.

The Appendix asserts ARINC did not show that

"(c) its member airlines endorse the construction of a system and are committed to purchasing service from such a system."

But, the airlines have endorsed private microwave and, indeed, use existing ARINC private microwave systems. There has been no reason for the airlines to become "committed" to purchasing private microwave service from a nationwide system during the pendency of the litigation over adequate service.

In addition to the above impossible evidentiary demands, Appendix E makes a number of gratuitous and erroneous criticisms of the probative evidence before the Commission in Docket 18128 showing that the cost level of an ARINC private microwave system is below present Telpak rates (App. E, ¶9).

The Appendix asserts

"(a) the cost data consists only of 'ball park' figures, i.e., very preliminary estimates."

ARINC submitted a 1400-page analysis of the specific equipment

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required on a site-by-site basis prepared, not by a consultant, but by Collins Radio Company, the nation's largest independent manufacturer of microwave equipment and for decades the industry leader in this field (ARINC Exs. 5 & 6; Tr. 7519-20).*

The Appendix asserts

"(b) they contain no hard survey or cost information for the actual microwave station sites."

Collins made preliminary map surveys and site selections relying upon the experience of the Collins Construction Division and three independent real estate companies (ARINC Ex. 5, p.3; Ex. 5B, pp.1-2; Ex. 6, p.7-4; Tr. 7239, 7410-11).

The Appendix asserts

"(c) they pay little attention to frequency congestion problems extant in some areas."

ARINC and Collins fully considered frequency congestion problems and proposed a combination of 2 GHz, 6 GHz, and 12 GHz microwave facilities and almost 200 miles of coaxial cable in recognition of frequency congestion, and ARINC had located available conduit for the cable (ARINC Ex. 6, pp.3-1, 3-7, 3-29; Tr. 9222).

4. Procedure

Appendix E's treatment of the complex factual issues bearing on competitive necessity demonstrates that, as is

* Citations are to the record in Docket 18128.

stated by ARINC and ATA in their earlier submissions herein, only a full evidentiary hearing would be adequate for their resolution. The extensive discussion of the lack of need for such a hearing (App. D), whether or not such analysis is appropriate to other aspects of the Report and Order, is completely inapposite as to the treatment of such specific adjudicative issues as the cost of private microwave to ARINC, the availability of financing to ARINC, and the subjective intent of ARINC should its status change.*

The Court of Appeals has held that to avoid evidentiary hearings

"[w]here Congress has plainly given interested parties the right to a full hearing, the agency must show that the parties could gain nothing thereby, because they disputed none of the material facts upon which the agency's decision could rest."
Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206, 1220 (D.C. Cir. 1975).

ARINC and ATA plainly dispute the material facts underlying Appendix E.

But on an even more fundamental basis, in Appendix E, the Commission has engaged in "a proceeding that in form is

* The cavalier statement in ¶9 of Appendix E that ARINC and ATA "have failed to point to any particular issue on which cross-examination would have further developed the facts" completely ignores the circumstances that we had no idea of how the facts would be mishandled prior to the release of the Report and Order.

couched as rule making . . . but in substance and effect is individual in impact and condemnatory in purpose." American Airlines, Inc. v. CAB, 359 F.2d 624, 631 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966). In Appendix E, the Commission attempts to adjudicate ARINC's specific, individual entitlement to service as a single customer, entirely apart from the "general policy questions" addressed in the basic Report and Order. Yet, as Appendix D recognizes, the denial of a full evidentiary hearing is not appropriate unless there is "the presence of general policy questions common to a large number of regulatees" (App. D, ¶3(1)).

V. CONCLUSION

In sum, Appendix E is factually, legally, and procedurally defective in its conclusion regarding the lawfulness of the so-called "single customer" provisions, especially those provisions relating to ARINC's role in serving the air transport industry. Further, if the Commission wishes to reach conclusions on items 9 and 10 of the "Items of Inquiry," relating to the "single customer" provisions, an evidentiary hearing would be required.

As the Commission itself seems to recognize in some portions of its decision, however, those items are essentially rendered moot, and need not be pursued, in view of its prescription of unlimited sharing and resale.

WHEREFORE, ARINC and ATA respectfully request the Commission to delete Appendix E and to delete from its Decision any holding to the effect that the so-called single customer clauses should be removed from AT&T or Western Union private line tariffs, and, instead, to order as follows on the single customer issues:

"In view of our decision today the issues raised by items 9 and 10 of our 'Items of Inquiry' are moot. Any customer acting under any of the so-called 'single customer' clauses will be an intermediary subject to regulation if its operations constitute 'resale' within the terms of this decision."

Respectfully submitted,

AIR TRANSPORT ASSOCIATION
OF AMERICA

AERONAUTICAL RADIO, INC.

August 25, 1976

PETITION FOR RECONSIDERATION

International Business Machines Corporation (IBM), Armonk, New York, by its attorneys, respectfully petitions for reconsideration of the Commission's Report and Order in the above captioned proceeding published in the Federal Register on July 26, 1976.^{1/}

IBM asks the Commission to reconsider its Report to the extent that it appears to subject to common carrier regulation heretofore unregulated entities which use private line communication service in aid of their primary business, be it data processing, the provision of hotel or airline reservation services, credit authorization services or the like.^{2/}

^{1/} 41 Fed. Reg. 30657 (hereafter "Report").

^{2/} IBM also asks that the Commission reconsider those aspects of its Report addressed by Computer and Business Equipment Manufacturers Association (CBEMA). See the statement in the conclusion, infra, p. 3.

While it is not clear from the Commission's Report that it actually intends to bring such businesses within its regulatory ambit,^{3/} there are several statements in the Report which are capable of that construction. For example, in paragraph 20 the Commission seems to state that the offerings of a "resale processor" must be taken to "include a resold communication service" and as such subject to Title II regulation.

Such a result, if intended, would overturn the Commission's decision in the original Computer Inquiry that it was undesirable (if, indeed, the Commission had jurisdiction to do so) to regulate companies that provide communications-based data processing services even in cases where those services include incidental message switching. Computer Inquiry, 28 F.C.C.2d 267 (1971); aff'd sub nom. GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). Any modification of the Computer Inquiry policy with a view to regulation of data processing services ought to be considered with the other issues raised in the Commission's new Computer Inquiry (Notice of Inquiry

^{3/} Such a step would be contrary to the Commission's prior pronouncements in this area over a long period of time. See, e.g., Aeronautical Radio, Inc. v. AT&T, 4 F.C.C. 155 (1937); AT&T Tariff No. 134, F.C.C. 63-752/38399 (Aug. 7, 1963) (use of private line services to provide stock market information service to some 700 customers held not to constitute resale of communication services in violation of carrier's tariff).

and Proposed Rule Making, Docket No. 20828, F.C.C. 76-745 (Aug. 9, 1976)). Indeed, had IBM considered that the basic judgment not to regulate data processing was being reconsidered in this proceeding, it would have sought to intervene long ago to urge that it be treated in the policy framework established by the original Computer Inquiry, and not in this proceeding, the issues of which are, at most, only tangentially related to the Computer Inquiry.

Conclusion

For the foregoing reasons and for those set forth in the concurrently filed Petition for Reconsideration on behalf of CBEMA, which is hereby incorporated by reference and adopted in full, IBM asks that the Commission reconsider and clarify its Report in this proceeding.

Respectfully submitted,

INTERNATIONAL BUSINESS
MACHINES CORPORATION

August 25, 1976

RESPONSE TO PETITIONS
FOR RECONSIDERATION

The Securities Industry Automation Corporation (SIAC), by its attorneys, hereby responds to petitions for reconsideration addressed to the policy towards sharing through a non-profit intermediary enunciated in the Commission's Report and Order, 41 Fed. Reg. 30657 (1976).

SIAC, in the submissions it filed in this proceeding, described the need for coordinated communications in the securities industry which is met, in significant measure, by SIAC and its SECTOR division. The performance of SIAC/SECTOR's functions in service of its industry depends on its ability, as customer, to order communications service from the underlying common carriers. Also, SIAC/SECTOR's efficiency is enhanced by the fact that it has been able to operate free

of excessive regulatory requirements. SIAC believes that the Commission's Report and Order, insofar as it requires all carriers to permit, without restriction, sharing of their private line services through "non-profit intermediaries," will create an environment in which SIAC/SECTOR can continue to meet the growing needs of the securities industry.

However, a number of other parties have sought reconsideration of various aspects of the Report and Order, and some of these allege difficulties in the implementation of the Commission's policies. In particular, several parties* address the recognition by the Commission that collective arrangements through non-profit intermediaries, such as SECTOR, are non-common carrier activities which should be allowed in the public interest and should not be subject to reporting requirements. Order ¶¶120-129. These parties appear to raise questions of interpretation of the Report and Order which they suggest need resolution so as to avoid doubt about the terms on which carriers must serve SIAC/SECTOR.

In our opinion, the Report and Order, when read as a whole in the context of prior Commission policy, correctly and adequately deals with what is termed "sharing through a non-profit intermediary."

* American Telephone and Telegraph Company, Telenet Communications Corporation, United Press International, Inc., and United Systems Service, Inc.

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First, the Report and Order distinguishes between "resale" and "sharing" on the basis that "resale" involves an offering to the public for profit (Order ¶17), whereas "sharing" is a non-profit arrangement for collective use of communications (Order ¶23).

Second, the Report and Order recognizes that to administer and coordinate sharing arrangements, a user group may find it necessary to "form an intermediary entity which is collectively owned by some or all members of the user groups." Order ¶25. Such an intermediary would "subscribe" to carriers services,* even though it "might" have no communications requirement of its own for the services to which it subscribes.**

Finally, the Report and Order concludes that "bona fide sharing arrangements" are not common carriage subject to the FCC's Title II jurisdiction (Order ¶120), and that there is no present need for prior authorization or ongoing supervision of sharing arrangements (Order ¶128). This approach is consistent with the Commission's historical experience with sharing-type arrangements in which it has "long made the distinction between persons engaged in providing service as common carriers and

* I.e., the intermediary would be the "customer" of the carrier, which orders service and is responsible for the payment of charges and compliance with the carrier's regulations. See AT&T Tariff F.C.C. No. 260 (Private Line Service) ¶2.5, definition of "customer."

** We agree with UPI (¶4) that the non-profit intermediary could also use the service directly.

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those rendering service on a non-profit, cooperative basis."*

In their petitions for reconsideration both AT&T (p. 50) and Telenet (p. 16) express confusion about the FCC's ability to distinguish a non-profit sharing arrangement from resale, where profit is allowed. Obviously, the Commission has not attempted, as Telenet implies, to establish a "bright line" distinction between sharing and resale based on the mere formality of incorporation under various state "not-for-profit" enabling statutes.** Rather, consistent with its long-established policy, the Commission would use the substantive fact of profit as a predominant factor in determining whether common carriage exists. Further, the Commission also uses the profit test for the specific purpose of serving as an indicator of whether an intermediary presents a substantial likelihood of an indiscriminate public offering.***

Hence, the motivation for an intermediary to engage in an indiscriminate public offering is likely to be nil if it

* Cooperative Sharing of Operational Fixed Stations 4 F.C.C. 2d 406, 417 (1966) (emphasis added). See also Letter from FCC to Counsel for Florists' Telegraph Delivery Ass'n, Dec. 5, 1951 (FCC Public Notice mimeo no. 70819, Dec. 6, 1951).

** Indeed, to require chartering under state "not-for-profit" statutes would seem to miss the point. It is substance and not form which counts.

*** United System Service appears to misread the Report and Order as blindly adopting profit as the sole test of common carriage and its argument against such a test is obviously irrelevant to what the Commission did in fact.

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has an institutional commitment to satisfy the traditional test of a non-profit entity, namely, that no part of its income is distributable to its owners.* As the Report and Order recognizes, such a formal arrangement for non-profit overall operations is "prima facie not common carriage 'for hire'". Order ¶121.

In addition, it seems clear that the Report and Order's use of the "non-profit" criterion, consistent with the Commission's past practice of not regarding non-profit operations as calling for regulation as common carriers for hire,** intends that the communications operations will be conducted without intent to receive more income therefrom than expenditures related thereto. This requirement obviates Telenet's apparent concern that "non-profit" entities may use communications service to subsidize other activities. SIAC also submits that the users of the services of cooperative, user owned or controlled intermediaries will be diligent to assure that charges are kept to a minimum and an excess of income

* See, e.g., 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* 328, 483 (1974).

** See *Cooperative Sharing*, *supra*, and compare the letters from Acting Chief, Common Carrier Bureau to Scantlin Electronics, Inc., and to Timeplex, Inc., both dated Feb. 5, 1971, in which it was ruled that a non-profit arrangement to share lines and multiplex equipment was not common carriage but a similar arrangement which included an element of profit would call for regulation.

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over expense is avoided.

The Report and Order in no way suggests that an operation which is non-profit in form, but constitutes an indiscriminate public offering in substance, necessarily will be immune from proper regulation. However, based on years of experience with sharing arrangements permitted under present tariffs, the Commission has not found that the theoretical "abuse" of resale "disguised" as sharing presents enough of a problem to require imposing reporting requirements on legitimate sharing arrangements. Order ¶128. Nonetheless, the Commission expressly indicated that it will make an ad hoc factual examination of any entity's operations which appear to fall within the traditional criteria defining common carriage. Order ¶125. In SIAC's view this "safety valve" lays completely to rest any expressed fears that the Report and Order's reliance on profit status as a preliminary criterion on common carriage may not cover, by itself, all possible abuses.

In sum, SIAC believes that the Report and Order's treatment of sharing through non-profit intermediaries is a practical and lawful solution to meet the needs for efficient,

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coordinated communications service in communications-intensive industries.

Respectfully submitted,

SECURITIES INDUSTRY AUTOMATION
CORPORATION

September 24, 1976